Decker Coal Company *and* United Mine Workers of America. Cases 27–CA–10259 and 27–CA–10259–3

February 19, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On February 21, 1990, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a cross-exception and a brief answering the exceptions and in support of the cross-exception. The Charging Party filed cross-exceptions, a supporting brief, and an answering brief. The Respondent filed an answering brief to the General Counsel's and Charging Party's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Decker Coal Company, Big Horn County, Montana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Refusing and failing to bargain in good faith with United Mine Workers of America—as the exclusive representative of employees in the appropriate unit of employees at all pits of Decker Coal Company now or hereafter added, who are engaged in production and maintenance at the Decker, Montana coal mine, excluding guards, watchmen, office clerical employees, engineering employees foremen and supervisors as defined in the Act—by unilaterally implementing last and final contract offers without having reached a valid impasse, and by refusing to process grievances because of the expiration of a collective-bargaining contract.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse and fail to bargain in good faith with United Mine Workers of America, as the exclusive representative of employees in the appropriate bargaining unit described below, by unilaterally implementing a last and final contract offer without having reached a valid impasse. The appropriate unit is:

> Employees at all pits of Decker Coal Company now or hereafter added, who are engaged in production and maintenance at the Decker, Montana, coal mine, excluding guards, watchmen, office clerical employees, engineering employees, foremen and supervisors as defined in the Act,

WE WILL NOT refuse to process grievances with United Mine Workers of America because a collective-bargaining agreement with that union has expired.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We note that the judge mistakenly referred in sec. III,A of his decision to ''June of 1989'' as the date of the Respondent's unlawful refusal to reinstate unfair labor practice strikers. Later in the decision, he correctly identified that date as June 1988.

[2] We affirm the judge's conclusion that the Respondent violated Sec. 8(a)(5) by unilaterally implementing its last and final offer on October 1, 1987, prior to a genuine impasse in bargaining. We disagree, however, with the judge's conclusion that the Respondent's declaration of impasse on September 30 constituted an independent 8(a)(5) violation. Initially, we note the absence of evidence that any of the Respondent's officials literally declared impasse, although the Respondent concedes that it effectively did so by making a last and final offer. Even had there been an express declaration of impasse, the circumstances of this case would not warrant finding a violation. ''Although some statements by negotiating parties may show an intention not to bargain in good faith, the Board is especially careful not to throw back in a party's face remarks made in the give-and-take atmosphere of collective bargaining.'' *Logemann Bros. Co.*, 298 NLRB 1018 (1990). Accordingly, we have modified the judge's recommended Order and attached a substitute notice deleting reference to the declaration of impasse.

Member Cracraft agrees with the judge that this case is factually distinguishable from *Storer Communications*, 297 NLRB 296 (1989), and *Dependable Maintenance Co.*, 274 NLRB 216 (1985), and 276 NLRB 27 (1985). She adheres to her dissent in *Storer* and she does not pass on whether she would have reached the same result in *Dependable Maintenance.*

We find it unnecessary to rely on the judge's reasoning to the extent it may be read to suggest that in no event can there be impasse where information requests are outstanding but we agree on the particular facts of this case that no such impasse was established.

WE WILL NOT fail and refuse to reinstate unfair labor practice strikers from whom we have received unconditional offers to return to work, including:

Jim Aksamit	Larry Kobielusz
Tom Allen	Darryl Kurtz
Bob Allred	Mary Lance
Duane Anderson	Gay Laya
Ron Anderson	Bobby Legerski
Ken Ballek	Madonna Lyons
George Batt	Raynard McKenzie
Larry Baumgartner	Bud Madron
Marshal Bears	Bob Marchant
Art Benton	Dan Mest
Bill Biesterfeld	Brent Moore
Bruce Bisbee	Bill Morgareidge
Dave Blankenship	Bruce Morrill
Bob Bond	Clayton Morris
Leonard Bull	Ken Mortensen
Dwight Castle	Vic Mortensen
Buddy Chaffee	Jack Murray
Bill Clark	Jerry Noecker
Lawrence Conner	Jerry O'Daniels
Pete Crook	Jim Palser
Roger Duin	Ernie Roberts
George Eisele	Brad Robinson
John Eychanor	Ron Rosenlund
Dalton Gaynor	Jim Schutte
John Gazdik	Merle Smith
Richard Glantz	Tom Smith
Ken Greer	Dennis Songer
Rick Hanslip	Gene Songer
Madge Herden	Derald Stiles
Dick Herman	Ray Swanby
Al Herrera	George Taylor
Gary Hinz	Gerry Thompson
Rod Howell	Larry Tibbets
Dale Jacobson	Steve Torbet
Dan Johnson	Rodger Wagner
Greg Johnston	Leroy Westika
Marc Ketcham	Dick Williams
Jim Kibler	Karen Woodard
Gary King	Jerry Woodward
Alan Kobielusz	Don Ziegler

WE WILL NOT tell unfair labor practice strikers that they will be permanently replaced if they do not report for work by a certain time.

WE WILL NOT in any like or related manner interfere with any of your rights set forth above which are guaranteed by the National Labor Relations Act.

WE WILL bargain collectively in good faith with United Mine Workers of America, as the exclusive representative of employees in the bargaining unit set forth above, and embody any understanding reached in a signed agreement.

WE WILL restore employment terms to the levels set forth in our 1986–1987 collective-bargaining contract with United Mine Workers of America and maintain them until such time as we have bargained in good faith and reached agreement or, alternatively, until a valid impasse is reached.

WE WILL make whole all employees in the above-described appropriate bargaining unit for any losses they may have sustained by reason of our implementation of unilateral changes in employment terms on October 1, 1987.

WE WILL offer to each of the above-named employees immediate and full reinstatement to the positions to which he/she would have been reinstated had their offers to return to work not been rejected, dismissing, if necessary, anyone who may be occupying the positions to which they are entitled or, if any of those positions no longer exists, to a substantially equivalent position, without prejudice to his/her seniority or other rights and privileges, and WE WILL make them whole, with interest, for any loss of pay they may have suffered as a result of our refusal to reinstate them.

DECKER COAL COMPANY

Michael J. Belo and *Michael T. Pennington*, for the General Counsel.

Warren L. Tomlinson, Jeffrey T. Johnson, and *Sandra R. Goldman (Holland & Hart)*, on brief, of Denver, Colorado, appearing for the Respondent.

John L. Quinn (Longshore, Nakamura & Quinn), of Birmingham, Alabama, and *Brad Rayson*, of Denver, Colorado, appearing for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Denver, Colorado, on March 28 through 31 and April 11 through 14, 1989. Ultimately, the record was closed by Order on July 21, 1989. On September 22, 1988, the Regional Director for Region 27 of the National Labor Relations Board (the Board), issued an order consolidating cases and consolidated complaint and notice of hearing, amended on March 16, 1989, based on unfair labor practice charges filed in Case 27–CA–10259 on October 9, 1987, and in Case 27–CA–10259–3 on March 21, 1988, alleging violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, § 29 U.S.C. 151 et seq. (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs that were filed by the parties, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Decker Coal Company (Respondent), has been a joint venture between Kiewit Mining Group, Inc. and Western Minerals, Inc., a subsidiary of NERCO Coal Co., with an office and place of business in Big Horn Coun-

ty, Montana, where it engages in the operation of a surface coal mine. In the course and conduct of that operation, Respondent annually sells and ships goods, materials, and services valued in excess of $50,000 directly to points and places outside the State of Montana. Therefore, I conclude, as admitted in the answer, that at all times material, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all times material, United Mine Workers of America (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

This case presents issues involving the duty to supply information requested by a bargaining agent and of the effect of that duty on the course of negotiating, and on the nature of a strike occurring after an impasse in bargaining was asserted at a time when not all such requested information had been supplied.

Respondent operates a two-pit mine—East Decker and, approximately 3 miles away, West Decker—located about 6 miles north of the Montana-Wyoming border. It is a joint venture of Kiewit Mining Group (KMG) and Western Minerals, Inc., a subsidiary of NERCO Coal Co., Inc. which, in turn, is a subsidiary of Pacific Corporation. KMG is Respondent's managing partner and, like Western Minerals, is a subsidiary—in its case a wholly owned subsidiary of Peter Kiewit & Sons, Inc. (PKS). PKS is a holding company which primarily conducts operations in the construction industry. However, in addition to Respondent, it also participates in three other coal mining operations: Big Horn Coal Company, a wholly owned subsidiary that has one mine located approximately 6 miles north of Sheridan, Wyoming; Rosebud Coal Company, a wholly owned subsidiary located near Hanna, Wyoming, approximately 300 miles from Sheridan; and, Black Butte Coal Company, a joint venture in which KMG is a 50-percent joint venturer, located approximately 350–400 miles from Sheridan. Employees at Black Butte are unrepresented. Those at Rosebud are represented by International Union of Operating Engineers Local 800. The Union represents employees at Big Horn. It also represents Respondent's employees in an appropriate unit of all employees at pits of Respondent now or hereafter added, who are engaged in production and maintenance at the Decker, Montana coal mine, excluding guards, watchmen, office clerical employees, engineering employees, foremen, and supervisors as defined in the Act.

However, the Union has not always represented Respondent's employees. Before 1983, they were represented by Progressive Mine Workers of America (PMWA). In a representation election conducted during that year, the employees elected the Union, rather than PMWA, as their collective-bargaining agent.[1] From September 1983, the Union and Respondent engaged in over 20 negotiating sessions in an effort to reach agreement on the terms for a collective-bargaining contract. However, they were unable to reach final agreement until September 1986.

Three aspects of that agreement are significant to the events that occurred in this case. First, it provided for a term of only 1 year, being effective only through September 30, 1987.[2] Second, the Union asserted during the negotiations that it did not want to make concessions that would constitute ''give-backs.'' However, along with some ''give and take'' on other proposals, the Union ultimately did agree specifically to a medical coverage provision that represented a substantial change and, Respondent concurred, could be characterized as a ''give-back.'' Third, two changes were negotiated in the employee pension program: benefit accruals for participants between ages 60 and 65 were increased from a one-half to a full benefit and, second, there was a change from cotrustees—one designated by Respondent the other by the employees' bargaining agent—to a single trustee chosen by Respondent.

These pension plan changes led to certain consequences apparently not anticipated by the parties as they were negotiating. Respondent's pension plans are regulated under the Employee Retirement Income Security Act of 1974, 88 Stat. 829, as amended, 29 U.S.C. § 1001 et seq. (ERISA). That legislation requires that there be a plan agreement, setting forth the terms and conditions of the pension plan; a trust agreement, establishing the financial mechanism for investing the money set aside under the plan and describing the specific authority and obligations of the trustee(s); and, a summary plan description that can be distributed to plan participants, providing a concise summary of eligibility and benefits, as well as legal resources available to plan participants. These documents last had been prepared for Respondent's plan in 1983, when PMWA had been representing the employees. Accordingly, they not only provided for a cotrustee, but they referred throughout to PMWA as the employees' bargaining agent. Largely undisputed expert testimony established that, prior to commencement of negotiations in the summer, ERISA imposed no obligation on Respondent to have the plan, trust, and SPD redrafted to reflect the changes negotiated in 1986.

Furthermore, it is readily understandable that Respondent would not eagerly have embraced the prospect of redrafting them. For, in addition to amending the documents to change from a cotrustee to a single trustee, they also would have to be amended to delete their numerous references to PMWA. As Respondent's own expert—testifying at a point in time after the plan, trust and SPD, in fact, had been redrafted—explained:

> What you had here, frankly, were changes which, although largely ministerial in nature, were multitudinous. They went through all—certainly all of the trust. The trust was written—rewritten almost in its entirety.
>
> The plan was rewritten substantially. There are little things—the kind of gotcha's because of the frequent references to—to the responsibilities of the—of the dual trustees, and now the transfer to a single trustee. It takes time to do that kind of drafting.
>
> Quite frankly, you're forced to rely on experts, if you [like] technocrats, if you don't like the word ex-

[1] They reaffirmed that choice in a second election held in 1985, as a result of a petition filed by PMWA.

[2] Unless stated otherwise, all dates in this case occurred during that year.

> perts; bureaucrats, if—if technocrats is too—too complimentary. You're forced to rely [o]n people who specialize in ''this and thats,'' and they have lots of ''this and thats'' to work on.

Similarly, the single trustee, John Ziegenbein, testified concerning the changes,

> it was not a complex task, but it was a time-consumming [sic] task to make all of the—to delete all of the appropriate references, but only delete what was necessary and to make the document internally consistent. . . .
>
> . . . .
>
> I did not view them as unimportant, but the nature of the changes was primarily administerial. They affected the administrative areas of the pension plan and the trust document. I wouldn't call them ''merely ministerial,'' and I would not characterize them as ''minor,'' or ''unimportant.''

Prior to commencing negotiations in the summer for a new contract with Respondent, the Union attempted to negotiate a new contract for employees at Big Horn. The then-existing contract with Big Horn had been agreed on by March 23, 1984, succeeding a contract that had expired only the previous day. However, negotiations in 1987 did not progress as smoothly at Big Horn as they had in 1984. Rather, by the contract's terminal date, the parties were not even close to agreement. While they agreed to extend the contract term until June 1, added negotiations did not generate agreement by that date. On June 4, Gary Houston, KMG's vice president of labor relations and the principal negotiator for Big Horn, sent a letter to the Union, outlining his last and final offer and, also, stating that he intended to implement that offer if he did not hear from the Union by June 10. The Union did request a meeting which was held on June 29, but no meaningful progress was made. Big Horn implemented its last and final offer on July 1.

Three aspects of the Big Horn negotiations are significant to the negotiations that occurred in this case between the Union and Respondent. First, the 1984 contract had provided for a modest increase in pension benefits. Pursuant to ERISA, the benefit changes were embodied in a draft revision of the plan and trust agreement. When those drafts were submitted to the Union for approval, it objected that certain items should be clarified. Houston testified that he had accepted those suggestions and the amendments ultimately were typed, executed, and filed by March 2, 1985, within a year of the date on which the parties had reached agreement on the 1984 contract's terms. Second, Big Horn's employees continued working in 1987, despite the breakdown in negotiations and implementation of Houston's last and final offer. Finally, during those negotiations, the Union had proposed a job security plan, called the Island Creek proposal,[3] whereby laid-off employees would be accorded preferential hiring and transfer rights at other mines operated by PKS, its subsidiaries, and subcontractors. When it became apparent that Big Horn would not agree to this proposal, it was modified by the Union so that preferential hiring rights would extend to Rosebud, Black Butte, and Respondent, in addition to leaseholds controlled by those three entities and by Big Horn. However, when the negotiations on June 29 concluded, Big Horn was willing to agree to preferential hiring and transfer rights only at leaseholds that it controlled.

In the instant case, Bruce Boyens, the Union's chief negotiator for negotiations involving both Big Horn and Respondent, sent a letter to Houston, also the principal negotiator for Respondent, requesting information similar to that requested earlier of Big Horn in anticipation of the negotiations with that coal company. Among the items sought were five that pertained to pensions, including:

> 24. The current ERISA Plan document for the pension plan including any and all amendments of [sic] modifications.
>
> 25. Provide copies of all benefit summary plan descriptions covering [Union] represented employees and retirees in this bargaining unit.

On receiving this request, Respondent did not contest the relevancy of any of the information sought by it, but instead made efforts to provide that information. Thus, as summer progressed, Respondent accumulated and transmitted some of the requested information to the Union on July 18, more on August 3, and still additional information on August 11.

Among the information sent on the latter date was the amended and restated pension plan for Respondent and PMWA. David S. Blitzstein, at the time research economist for the Union, testified that on inspection of the pension-related information provided by Respondent, he discovered several items that he believed should be corrected. Thus, he felt that the program was grossly overfunded. He viewed as probably illegal the cap that the program contained for employees once they reached 70 years of age. Finally, he considered the submitted plan to be stale, because it contained references to PMWA and made no reference to any of the changes embodied in the then-expiring 1986 contract.

As described in greater detail in section III,B,1, infra, throughout negotiations with Respondent, the Union sought production of a pension plan and trust agreement incorporating the 1986 changes, asserting that such documents were needed to bargain intelligently and, also, that their absence probably violated ERISA. However, in contrast to the nature of the 1984 Big Horn pension changes that had to be incorporated immediately in a revised plan and trust agreement under ERISA, as pointed out above, Respondent had not been obligated by that legislation to prepare a revised plan and trust agreement by the time that negotiations had commenced with the Union on August 4. Nevertheless, once the Union made plain that it needed an updated plan and trust agreement to negotiate properly, Respondent undertook their preparation. However, they were not completed until mid-November.

Meanwhile, by September 18 the Union felt that there was a sufficient objective basis for believing that an alter ego or single-employer relationship existed between Respondent and other entities, particularly PKS, to request that certain business information pertaining to those firms be produced. It made such a request on that date. By September 30, Respondent had produced most of the requested items, although some of them had not been answered fully, to the Union's

[3] So called because it originated in the Union's negotiations with Island Creek Coal Company, a West Virginia coal company.

satisfaction, by that date. However, the remaining information was supplied during the months of October and November.

On September 30, Respondent made a last and final offer, after which Houston departed from the negotiating session then in progress. He testified that, by that time, he had believed that the parties were at impasse and the Union construed his departure as a reflection of that belief, although it disagreed that, in fact, an impasse had been reached. During an executive board meeting that followed, a decision was made to commence striking at 12:01 a.m. on October 1. Following commencement of the strike, Respondent implemented the terms of its last and final offer, refused to process grievances filed under the expired contract for a 4-month period, notified striking employees that they must report to work by October 12 or they would be subject to permanent replacement, and, ultimately, refused to reinstate 80 strikers, whose reinstatement had been sought by the Union, on the grounds that their positions were then occupied by permanent replacements, although Respondent did place their names on a preferential hiring list.

The General Counsel alleges that Respondent violated the Act by the 4-month hiatus in grievance processing; by the delay in submitting the pension information requested on June 22; by not affording the Union sufficient time to examine the so-called alter ego/single employer information that had been provided in response to the Union's September 18 request; by declaring an impasse and implementing the terms of its last and final offer at a time when relevant information had not been supplied and when there had been insufficient time to examine the information that had been provided; and, by refusing to reinstate the 80 strikers because, alleges the General Counsel, their strike had been caused by Respondent's unlawful declaration of impasse and had been perpetuated by Respondent's unlawful implementation of the terms of its last and final offer.[4] Respondent agrees that it did violate the Act, and I so conclude without further discussion, by refusing to process grievances for a 4-month period after expiration of the 1986–1987 contract. However, it disputes the remaining allegations, arguing that, given the number of issues still in dispute on September 30, the impasse would have occurred even had the Union possessed all of the information it had requested and even had it received ample time to examine and to evaluate it. Moreover, argues Respondent, the strike was called to protest the absence of agreement on the terms for a contract, with the lack of information being but an afterthought designed to secure statutory protection for strikers to which they are not entitled under the facts of this case.

For the reasons set forth more fully, infra, I conclude that Respondent did not violate the Act by the delay that occurred in submitting the pension plan requested in June. The evidence establishes no more than that the Union had sought certain information based on its misinterpretation of ERISA's requirements and, in turn, that Respondent did not understand the information truly being sought by that request until it was clarified after negotiations actually had begun. Given the complexity of preparing a revised plan, it cannot be concluded that a delay until mid-November, for submitting the revised document, was unreasonably long and, accordingly, unlawful. Similarly, all the information sought in the September 18 letter to Respondent had been provided within 2 months of the date of that letter. The record is devoid of any evidence that Respondent delayed unreasonably in providing it.

Conversely, a preponderance of the evidence does support the conclusion that Respondent violated the Act by considering negotiations at impasse on September 30 and, consistent with that view, by making its last and final offer on that date. For, by that point in time, it had not yet provided all the relevant information requested by the Union and, further, had not allowed the Union a reasonable time to examine the recently supplied alter ego/single-employer information. Pensions and employment security are mandatory bargaining subjects. A roadblock to bargaining about those subjects existed because of the absence of requested relevant information pertaining to them. Moreover, given the inherent interrelationship between the various subjects of bargaining, it would be an exercise in speculation, rather than adjudication, to try to reconstruct the course of negotiations based on an assumption that all of the information been provided to, and reviewed by, the Union in a setting devoid of an asserted impasse and of the unilateral changes that followed. Nor is it necessary to do so, since Respondent has shown no statutorily countenanced need for having taken the actions that it chose to take on September 30, without first having supplied the Union with the requested information. In short, Respondent simply ''jumped the gun'' by not allowing negotiations to continue so that it could determine whether or not total agreement could be reached after the Union had received and reviewed all the information that it had requested.

Furthermore, a preponderance of the evidence establishes that at least one cause of the strike was Respondent's declaration of a last and final offer before all the requested information had been supplied, although there is no evidence that the decision to strike had been predicated on the lack of opportunity to examine information that had been supplied. As Houston was preparing to depart negotiations on September 30, Boyens protested that Respondent had failed to provide all the information that the Union had requested. There was credible testimony, supported by objective considerations, that this same theme had been voiced during the ensuing executive board meeting that produced the decision to initiate the strike. Moreover, implementation of Respondent's last and final offer created a situation where employment terms were unilaterally imposed that served to inherently prolong the strike, notwithstanding the fact that all the requested information ultimately was provided to the Union. Consequently, the strike commenced and remained categorized as an unfair labor practice strike and when Respondent declined to immediately reinstate the strikers in June 1989, it further violated the Act.

After the hearing had closed, the General Counsel moved to amend the complaint in two substantive respects: to allege a violation of Section 8(a)(1) of the Act by the October letter telling strikers that they would be replaced permanently if they did not report for work by October 12 and, more importantly, by declaring an impasse on September 30 when there had been no impasse in negotiations, regardless of the status of responses to the information requests. Not surprisingly, Respondent opposed granting the motion, but the Union sup-

[4] It is not alleged that the strike was caused or perpetuated by the 4-month refusal to process grievances.

ported it. However, in view of the foregoing conclusion that Respondent violated the Act by declaring negotiations at impasse at a time when unanswered requests for relevant information existed, the General Counsel's motion to add the allegation that no impasse existed in any event is no more than an alternative theory leading potentially to the same conclusion. It adds nothing to the remedy for the violation that I conclude did occur in this respect. Accordingly, it is cumulative and I deny this aspect of the motion.

In contrast, it is not disputed that the October 2 letter was sent to strikers. Employees are entitled to notice not only that they must be reinstated where they are unfair labor practice strikers, but also that they cannot be told that they can be replaced permanently. Accordingly, I grant this aspect of the motion to amend complaint and, further, conclude that Respondent violated the Act by sending this letter to striking employees.

B. *The Alleged Refusals to Bargain and Changes in Employment Terms*

1. Evidence

The first negotiating session occurred on August 4. It was fairly brief, consisting essentially of a discussion of ground rules for conducting the negotiations, statements by each side regarding general goals, and agreement that noneconomic proposals would be exchanged at their next meeting, with economic ones being deferred to a later date. The only other incident of significance to this case was that Houston admittedly said that Respondent would ''like to get an agreement by October 1.''

The next negotiating session was held on August 18. It commenced with an exchange of noneconomic proposals. In addition to one involving job security—similar to the Island Creek proposal—five made by the Union pertained to pensions: that amendments must be submitted to the Union's international body for approval; that plan termination language be inserted into the contract; that Internal Revenue Service funding waiver applications be prohibited during the contract's term; that excess assets revert to participants in the form of improved benefits after all liabilities are satisfied under the plan; and that Respondent annually provide the Union's international with an actuarial report, trustee report and DOL form 5500 during the contract term. Following a brief discussion of the similarity of leasehold information submitted during the Big Horn negotiations to that requested of Respondent and, also, of tool allowance and safety committee, the parties recessed to review the proposals. The remainder of that day was spent going item by item through, first, the Union's proposal and, next, the one submitted by Respondent. During that process, Houston voiced specific objection to the Union's union-security proposal; Boyens said that it was a ''must'' item. Conversely, Boyens objected to Respondent's broad subcontracting language, stating that the Union would not agree to it then, nor on October 1. Indeed, the Union proposed added restrictions on Respondent's then-existing contractual right to subcontract work.

This process of item-by-item review of proposals continued during the next negotiating session, conducted on the following day. Particularly discussed were working out of job classification and topics encompassed by the general category of job security, such as seniority and job bidding. With regard to pensions, Houston said that some of the Union's noneconomic proposal appeared acceptable, but that he needed time to have them reviewed by someone more experienced in pensions and promised to comment on them more specifically after that had been done. Toward the end of that session, Boyens characterized the Union's job security and union-security proposals as ''must'' items. The parties adjourned with the understanding that economic proposals would be exchanged at the next negotiating session, scheduled for September 9.

As set forth above, before that session occurred, the Union had received the amended and restated pension plan. On September 1, Blitzstein telephoned Houston, requesting that Respondent submit the plan amendments, as well as a copy of the trust agreement—a document not included among the information requested by Boyens on June 22. Houston agreed to transmit those items. However, he then discovered that the amendments had not yet been drafted. Trustee Ziegenbein testified that, until that time, he had been unaware that Respondent and the Union were negotiating about pensions. Informed by Houston that ''we need to get on that as soon as possible,'' Ziegenbein began preparation of those documents. However, they were not finalized, signed, and ultimately transmitted to the Union until mid-November. Ziegenbein testified that this delay had been occasioned by the extensive rewriting necessitated by the charges. In fact, before the finalized documents were completed, there had been two preliminary drafts of the plan and one of the trust.

Although the parties exchanged economic proposals at the September 9 negotiating session, no pension proposal was made because Blitzstein had not arrived in time for this session. For the most part, Boyens and Houston simply conducted a general review of the items in their respective proposals, quizzing each other on certain aspects of them. For example, Houston agreed that Boyens was correct when the latter observed that the absence of wage rates in Respondent's proposal meant that a wage freeze was being proposed. By constrast, the Union proposed hourly increases of 65 cents in the first contract year, 55 cents in the second, and 40 cents in the third.

Two aspects of their exchange that day do pertain to issues in this case. First, Respondent made a wide-ranging job security proposal that embraced such items as seniority, promotions, layoffs, and training. Second, the 1986 contract contained a change in medical-dental coverage from what had existed previously when PMWA had represented the employees. The Union proposed restoration of the previous level of coverage. However, Respondent felt that this proposal would cost considerably more than the contractual plan. Instead, it proposed a total comprehensive plan with provisions similar, if not identical, to those existing in the plan provided to its supervisors.

Blitzstein attended the September 10 negotiating session and was provided with a copy of the most recent trust agreement, pursuant to his September 1 telephone request. As was true of the plan, it did not include the 1986 changes. He inquired if the amended plan was available. Houston replied that Ziegenbein had said that he would complete and have it submitted as soon as possible. When Blitzstein asked if an updated SPD was being prepared, Houston answered that he did not know if one was being drafted.

A lengthy discussion ensued regarding provisions in the amended and restated pension plan. For example, in response to Blitzstein's remarks, Houston explained that the references to PMWA were being deleted; that section 12 of the 1986 contract had been changed to a single trustee because of excessive costs incurred whenever there had been meetings of trustees; and, that the only other pension change in that contract had been the increase in benefit accrual for employees between ages 60 and 65. Asked if the current plan would continue to provide for union approval or disapproval of plan amendments, Houston responded that he would have to check. Blitzstein claimed that section 12.3 of the amended and restated pension plan gave the Union the right to do so and asserted that the Union wanted to maintain that right. Houston said that he would ascertain if that right remained under the terms of the 1986 contract.

During the course of that discussion, aspects of Respondent's relationship with PKS and its other entities surfaced. Blitzstein asked if Ziegenbein was employed by PKS; Houston replied that he was. At another point, Blitzstein asked why there was so much guarantee money for bargaining unit employees under the guarantee investment contract used by Respondent. After mentioning that corporate policy sought overall equality, Houston responded that he would have to check on whether that investment contract was comparable to ones for nonunit employees. Moreover, in the course of explaining to Blitzstein, as he had earlier to Boyens, the reason for Respondent's position on health benefits, Houston stated that past unit coverage had caused hard feelings among supervisors and administrators who participated in a different, less beneficial plan. Blitzstein asked if Houston was saying that Respondent's position represented corporate policy. Houston replied that he was trying to achieve consistency among all mines, but that cost was a factor, adding that there were a number of other corporate plans—profit-sharing, 401K, stock-option, and short- and long-term disability plans—with which the Union's plan was not consistent.

Prefaced with the caveat that he reserved the right to add proposals when he received all of the requested pension information, Blitzstein presented certain pension and retirement proposals: for cotrusteeship; for increased benefits, such as increased general benefits for current and retired employees, 100-percent joint and survivor benefits, medical coverage for retirees, and elimination of a single pharmacy feature; and, for reversion of excess assets to participants in the form of improved benefits. Any increases, claimed Blitzstein, could be funded from excess assets in what the Union regarded as a tremendously overfunded pension plan. Houston countered that Respondent regarded these assets as no more than adequate, not overfunded, and, in any event, that just because money was there did not mean that it had to be spent. Blitzstein asked why there were higher returns on nonunit than on unit pension investments. Houston replied that he would look into the reason.

Ultimately, further discussion about retirement benefits was tabled until more of the requested information could be produced. Boyens made counterproposals pertaining to other subjects, including one relating to job security that modified the Union's initial proposal by restricting it only to mines owned by PKS and NERCO west of the Mississippi River. As the meeting was concluding, Boyens mentioned that the Union was not interested in concessions and said that he felt the parties should focus on job security inasmuch as it was a very important issue. He added that he hoped that he did not see it happen at Respondent what had occurred at other western mines, a remark understood by all as a reference to a strike. Possibly in response to Boyens' suggestion on September 10, most of the September 11 negotiating session pertained to job security. Houston inquired how the Union's proposal would operate in light of local hiring preferences at the mines. Boyens explained that, under the Union's proposal, local recall lists first would have to be exhausted; then, before others could be hired, Respondent's laid-off employees, if qualified, would have hiring preference at the other PKS coal mines. Boyens restated the priority to the Union of job security. Houston said that he understood the Union's position and suggested that the parties go back to the drawing board.

Before this meeting adjourned, Boyens again inquired about the status of the requested information, observing that it was difficult to proceed without it. Blitzstein requested copies of the investment contracts for the other plans mentioned the previous day by Houston, so that comparisons could be made by the Union. Houston agreed to do so whenever he could locate them. In addition, Blitzstein requested a copy of the supervisors' health insurance plan. By letter dated September 16, Houston did transmit a copy of the supervisors' health plan. In that letter, he also pointed out that section 12.3 pertained to distribution of residual assets, not to the right of the Union to approve amendments, as Blitzstein had asserted on September 10.

On September 18, the second principal area of requested information surfaced. For on that date, Boyens sent a letter to Houston,[5] asserting that ''certain actions, statements, and assertions'' during the negotiations had led the Union to conclude that Respondent and PKS ''may constitute [a] single employer . . . or alter ego'' and, accordingly, that the latter also should be included in the negotiations. Boyens went on to request several items, enumerated in 16 numbered paragraphs, ''to determine [PKS'] relationship with [Respondent] . . . in order that the [Union] is assured of securing and protecting the contractural rights of unit employees.'' Neither on receipt of this letter, nor during the ensuing negotiations, did Respondent challenge the relevancy of the information requested by Boyens.

Boyens testified that a series of factors had led him to send this information request to Respondent. Prior to commencing negotiations, the Union had known that Respondent was a joint venture of NERCO and PKS; that Respondent was operated by a PKS-affiliate; that lease information appearing to relate to Respondent had been received during the Big Horn negotiations; and, that Respondent's mine manager, Leonard Skretteberg, had been mine manager or superintendent for Big Horn, Mine Superintendent Frank Kavulok had bargained for Big Horn in 1984, and Houston had been the chief spokesperson in negotiations for both Big Horn and Respondent. In addition, the Union's local representatives had complained that when trying to settle grievances short of arbitration, Respondent's local officials had been saying that they had to first contact Omaha, where PKS is headquartered. Then, testified Boyens, during negotiating sessions prior to September 18, he had learned that Ziegenbein

[5] The Union sent identical requests to Respondent and to PKS.

was an employee of PKS and served as trustee or administrator not only for Respondent's plans for unit and nonunit employees, but apparently also for those in effect at Black Butte; that the same investment company did the investing for all retirement programs; that Respondent's health benefit program for supervisors contained references to PKS; and, of course, that consistency on a corporatewide basis was one of Respondent's primary objectives in negotiating a health plan with the Union.

As a result of these factors, testified Boyens, he had become concerned about Respondent's ability to resolve the issues posed in the negotiations, especially those relating to job security, without participation by one or both of the joint venturers—most especially, PKS. Similarly, Blitzstein testified:

> because our job security provisions, that we were proposing, were all interconnected with ownership relationships, it was important to tie down who we were dealing with. And, [Respondent] had a very unique situation. We know [sic] it was a joint venture of two major companies, so that added a different twist to the situation.

And, at another point, Boyens stated:

> So we had to come to grips with and discover who the company was in order to determine who the proper person was that should execute this agreement and if we're able to . . . get job security, who the proper party was to grant job security.

Indeed, Boyens's job security concerns were not simply abstract ones. For, Houston acknowledged that it had been announced earlier that same year that there would be layoffs during the course of the year. As a result, agreed Houston, ''I'm sure the employees would be concerned about layoffs.''

Houston received Boyens' letter on Monday, September 21, the day before negotiations were scheduled to resume. He assigned his lone assistant, Meyer Korth, the task of marshalling the information requested. During succeeding days when there were no negotiating sessions, Houston returned to Omaha to assist Korth in this process. There is no basis for faulting Respondent's efforts for the time taken to supply the information to the Union. Nevertheless, not until September 30 did it do so.

Meanwhile, negotiations resumed on September 22. During an exchange pertaining to health benefits, Houston emphasized that Respondent was interested in cutting costs, as well as in achieving uniformity among plans. Blitzstein accused Respondent of not being consistent, because its proposed plan did not include what the Union viewed as the favorable aspects of other plans, such as coverage for disorders and for drug and alcohol addiction. Houston replied that Respondent was willing to consider including those items for Respondent's employees.

An extensive discussion occurred concerning pensions. Blitzstein inquired about the reason for the large disparity in rates of return between the PKS profit-sharing plan and Respondent's pension plan. Houston responded that he would have to check on that. Blitzstein asked about the state of preparation of the plan and trust documents, complaining that Respondent was placing the Union in an intolerable situation—that those documents were absolutely necessary to prepare pension proposals, because the existing documents contained irrelevant language and did not show ''what exists today'' in light of the failure to incorporate the 1986 contract changes. Houston said that Respondent was working on this and that the revised documents should be completed fairly soon. But, added Houston, he did not understand why Blitzstein was making such a ''big deal'' out of this, as there only had been two changes in 1986: reduction to a single trustee and increased accrual benefits for employees between 60 and 65 years of age. Blitzstein said that getting a union trustee back in the plan was a priority item—one on which he hoped to see some compromise by Respondent—because the Union wanted to know exactly what was taking place and sought some control through participation in administration of the plan. He also reiterated that as the plan and trust already submitted by Respondent explicitly gave the Union the right to approve plan amendments, he expected that this approval right would continue to be included in the amended documents.

During this meeting, Houston made certain proposals regarding the pension plan. He accepted two of the Union's noneconomic pension proposals—the one requiring insertion of plan termination language in the contract and the one obliging Respondent to annually provide the Union's international with an actuarial report, trustee report and DOL form 5500—and proposed deleting the age 70 cap on mandatory retirement, as well as including 100-percent joint and survivor retirement option on an actuarially reduced basis. However, when Blitzstein asked if Respondent had prepared an actuarial reduction table to calculate the difference in benefits under the last proposal, Houston answered that he did not have one. Blitzstein requested that one be provided so that he could make sense of that portion of Respondent's proposal. A further discussion ensued about whether or not the fund was funded excessively, with each side restating its previous arguments.

As the session neared conclusion, Blitzstein said that Respondent's 1-year contract term was unacceptably short, that the Union viewed Respondent's subcontracting proposal as overly broad and a particular sore point, and that a lot of union feeling could be soothed by agreement to a union-security provision, a particularly important institutional concern of the Union. After a recess, Houston responded that he was disappointed that the Union had not made a counteroffer and, with specific regard to the union-security proposal, that Respondent had heard that the Union's large percentage of signed up members had resulted from harassment and arm-twisting.

During the course of the September 23 negotiating session, Respondent offered some modifications to its earlier proposals. Boyens increased the length of the Union's proposed contract term from 36 to 42 months, adding that it was subject to substantial reduction if Respondent would enter into a side agreement embodying job-security provisions that would survive the contract term. Boyens also said that he would like a response to his single-employer information request by the following week. Houston said that it was being worked on and that he would do the best that he could to furnish that information. Boyens said that the Union was willing to eliminate its earlier proposal strengthening the sub-

contracting clause, because he felt that the job-security clause would provide sufficient protection.

With respect to pensions, Houston reported what he had learned about the return rate discrepancy between Respondent's pension plan and PKS' profit-sharing plan. After complaining that without the requested current plan and trust, the Union could not make a full pension proposal, Boyens inquired when these documents would be ready. Houston replied that Respondent was working on them, but opined that it was no ''big deal.'' Boyens disagreed, saying that he understood that a lot of the old plan and trust needed to be rewritten and that the rewriting process was not simple. Boyens continued by saying that as a bargainer, he would be silly to simply take someone's word that the process involved no more than a simple redraft. Their discussion concluded with Houston repeating that, with a small change in one, he could accept the two items from the Union's noneconomic pension proposal that he had identified during the September 22 session.

Most of the negotiating session on September 24 was devoted to a discussion of job security. Pensions were mentioned only twice. Boyens again said that he could not make proposals on that subject without the requested information. At another point, Boyens said that the supervisors' medical plan was unacceptable, but that the Union felt that the existing retirement surplus could be used to fund a medical program for retirees.

Respondent offered a revised working out of classification proposal. Boyens responded that he felt that Respondent's overall position on job security simply would breed charges of favoritism and, concomitantly, generate grievances. A simpler solution, claimed Boyens, would be to rely on skill and ability, as was done at Big Horn and as the Union's proposals contemplated. In this way, argued Boyens, Respondent and its related corporate entities would avoid grievances and secure a ''known commodity,'' by allowing Respondent's workers to fill vacancies as they became available at other mines through a system of preferential hiring and transfers. However, Houston countered that those who were good workers could be hired at other mines, without the need for a preferential system. Boyens said that he could agree in concept to the revised working out of classification proposal if Respondent would agree to some aspects of the Union's union-security proposal. Moreover, he withdrew references to accretion from the Union's job-security proposal, but pointed out that the Union especially wanted the information requested on September 18, because it went to the heart of the Union's job-security proposal.

On that same day, Boyens sent another letter to PKS and one to NERCO seeking information similar to that requested of Respondent and of PKS on September 18. By letters dated September 29, PKS responded to the Union's requests, although it specifically challenged some of the factual contentions made by the Union in its requests. Meanwhile, the parties resumed bargaining in Sheridan, Wyoming, commencing what would prove to be the final three negotiating sessions prior to occurrence of the strike.

At the September 28 negotiating session, Houston submitted an updated proposal, containing the changes that he had proposed following the Union's initial proposal. A discussion of a possible 4–10 workweek ensued. Boyens inquired about the status of his information requests. Houston replied that Respondent still was working on the pension information and said that Boyens should be receiving the information sought in his September 18 letter to Respondent. In the course of the conversation about the pension information, Houston said that the consultant working on it would make the changes dictated by the 1986 contract, as well as changing the name of the employees' bargaining representative. But Boyens, again, responded that simply telling him did no good, because he needed the revised documents to see if these changes actually had been made. Before this session concluded, the Union altered its wage proposal, proposing a $1000 bonus in the first contract year, followed by a 45-cent per hour increase in the second one and a 35-cent increase in the third contract year.

When the September 29 session commenced, Respondent proposed some changes, although none dealt with pensions or job security. During a discussion of pensions that did ensue, essentially two topics were covered: the comparative differences in investment returns between the PKS profit-sharing plan and Respondent's pension plan and, second, production of the updated plan and trust. With respect to the former, Houston said that the disparity was not so great as portrayed by Blitzstein, adding that the difference resulted from the dates when investment contracts had been purchased. Claiming that this made no sense, Blitzstein requested copies of those investment contracts. Houston replied that he was not sure that the Union was entitled to them, but that he would check. He suggested, however, that since he did not ''understand this stuff,'' that Blitzstein directly contact and obtain answers from Greg Broz, a PKS employee.[6]

Concerning the second pension topic, the request for current documents, Houston complained that he did not understand why the Union continued bringing this up, since only two pension changes had been made as a result of the 1986 contract.[7] Blitzstein responded that the drafting process was not a simple administrative task, because a change to a single trustee involved rewriting a substantial portion of the plan relating to its structure and such a change goes to the very heart of it—that the Union had made pension proposals, but had been bargaining in the dark without the revised documents and needed them to prepare and formulate proposals, because it did not intend to simply take Respondent's word for it. When Houston repeated that the only changes being made were those enumerated in the 1986 contract, Blitzstein retorted:

> Okay. If that's the case, I just want to state for the record here that both the plan and the trust give the approval authority on all plan amendments to the Union,

[6] Blitzstein testified that he had no opportunity to do so on September 29 and 30 and, further, that doing so simply ''slipped through the cracks'' afterward.

[7] Houston testified:

> My view of it was that we were at the table to negotiate whatever it was that we could negotiate. But, basically as I viewed it, the drafting of plan amendments . . . I know I referred to it as an administerial act. I think I called it, too, perfunctory tasks that were performed by the consultant. The process, as I saw it, was basically one whereby the parties would negotiate whatever they wanted to negotiate, in terms of concepts, benefit levels, benefit alternatives, options; and, then, the consultant would—would be told what had been negotiated and . . . they'd take from there in terms of handling the . . . plan documents; the plan trust; the plan itself.

> as well as the Company . . . [and] there had better not be any changes here.

The importance to the Union of this approval authority was illustrated by what occurred later in the session. For before it concluded, Boyens withdrew the Union's cotrustee proposal on condition that Respondent agree to the Union's first noneconomic pension proposal: that the Union would continue to possess the right to review and approve amendments to the plan before they became effective. Boyens said that he would agree to this revised proposal once he actually saw the updated documents. Houston said that, ''The Consultant advises it should [take] two more weeks'' and that the documents would be forwarded to the Union when prepared. The Union also reduced the amount of its proposed first contract year bonus to $950.

Prior to the luncheon recess, Respondent repeated that it sought a contract by October 1. Boyens angrily responded that he was being forced to negotiate in the dark because he did not have the information that he needed; that Respondent had made no movement on the medical plan even though its costs had been virtually identical before and after existence of the expiring contract and even though the pension surplus would pay for some of the items sought by the Union; that the Union was not willing to make concessions and wanted to see some significant ones by Respondent in the areas of job security, subcontracting, insurance, foremen working, contract duration and union security; that there was no logical reason why Respondent could not agree to job security, a no-cost item, and to withdraw its subcontracting and supervisor-working proposal; that he saw Respondent as one employer with NERCO and PKS, regardless of what was disclosed by Respondent's response to the Union's single-employer requests; and, that Respondent was aware of what the Union had had to do to secure job security in the west[8] and that Respondent was giving the Union an invitation to a fist fight, which meant a strike.

The parties adjourned for lunch, agreeing to resume negotiating at 2:30 p.m. However, before that time, Houston telephoned Boyens and canceled the afternoon session, saying that he wanted to review the proposals before meeting again.

The final negotiating session was conducted on the following day, September 30. Respondent gave Boyens a copy of its reply to his September 18 information request. Then, Houston delivered two written and recited several oral proposals. With respect to pensions, Respondent agreed to items two and five of the Union's noneconomic pension proposals, so long as the words ''and plan amendments, if any'' were added to the fifth item; provision for 100 percent surviving spousal benefits; and, deletion of the after-age 70 cap. Houston also promised to provide copies of the investment contracts requested the day before by Blitzstein. He continued by saying that current wages were at the top of the ladder and Respondent believed that controlling costs was the best job security. With regard to the latter, Houston said that it was incomprehensible that the Union believed this to be a nocost item—that Respondent viewed it as a cost item of the first order and that the Union's proposal infringed on Respondent's right to run its mine and to hire locally, a right that Respondent did not intend to surrender. However, he did modify the broadened subcontracting provision that initially had been proposed by Respondent.

Following a 2-hour recess, negotiations resumed. Having reviewed the single-employer information during that recess, Boyens identified five areas in which he regarded the response as incomplete: that Respondent had provided only summaries of its management committee meetings during which reference had been made to PKS, whereas the Union was seeking the minutes, themselves, of those meetings; that Respondent had replied that no single person held a labor relations-related position in both Respondent and PKS, whereas the Union had sought the identities, titles and duties of officers, shareholders, directors, or management representatives who held a position in either one; that in response to the request for identities of any individual who performed any services for Respondent and PKS, Houston had answered only that approximately 90 to 100 did so, although his response added, ''We are still researching the names, job titles and company of these persons and will provide that information as soon as it is obtained''; and, that with regard to the request for identification of all services that PKS provided to Respondent, Houston had replied only that PKS ''provides some accounting and financial-related services, some purchasing and some legal-services,'' without specifying what they were. Moreover, with regard to the request for all communications from PKS to Respondent ''governing the work to be performed by [Respondent],'' Houston had answered that Respondent was ''unclear'' what was meant by that phrase. Boyens explained what information the Union was seeking in each of these categories and Houston promised to provide all of it. In addition, Houston promised to look into Boyens' assertion that some of the lease information given to the Union had proved inaccurate when it was checked.

In a discussion that ensued following Boyens' query as to whether Houston had PKS' proxy to settle a contract, KMG's name surfaced. Boyens testified that, until then, he had believed that this entity was no more than a ''flow chart division.'' Based on answers to his questions concerning KMG, Boyens said that he was putting Houston on notice that the Union intended to seek the same information about it as had been sought about Respondent, NERCO and PKS, because,

> if they held all these properties and were the one that could grant the job security and were in fact now the single employer possibly, then that was the person we wanted to look toward in order to get the proper person to sign the agreement and job security. It was both important in job security and in pension.

Boyens asked if the new plan and trust documents were available. He accused Respondent of having violated ERISA by not having redrafted them by now and, further, said that he could not make complete proposals without them and, for that matter, without the added information sought in his September 18 request.

Boyens then made a series of proposals. He prefaced them with the assertion that it was late and he wanted to move the negotiations along, even though he was not waiving the Union's right to make added proposals and, moreover, felt that NERCO and PKS should have people at the table. Then, Boyens withdrew the lessor/lessee portion of the job-security

[8] An admitted reference to striking.

proposal, coupling, instead, the phrase ''coal mining subsidiaries and affiliates'' to current mines and those newly acquired by NERCO and PKS during the contract's term; sought language maintaining employees' jobs when subcontracting occurred; withdrew the Union's card check and neutrality pledge portions of the job-security proposal; proposed a change in the tool allowance payment method; and, reduced the wage proposal to a $900 lump sum payment in the first contract year and 40- and 35-cent-per-hour increases in the next 2 years. Boyens continued his presentation by criticizing Respondent's position on wages, calling it unacceptable in light of increased production and revenues and, further, inasmuch as craft employees had received no raises since 1983. Then he said that the Union had room to move on all these items and wanted to continue negotiating,[9] but needed movement by Respondent. However, accused Boyens, Respondent was offering no quid pro quo despite its desire for the Union to agree to changes in medical plan simply to achieve corporate consistency. Boyens concluded by adding that the Union could move, but not without the requested information.

After the luncheon recess, Houston said that he needed to review the proposals so that everyone understood the parties' positions. He then went through Respondent's updated proposal, covering in detail each outstanding item, such as inserting language providing the joint and survivor benefit and deleting the age 70 cap. In the course of this review, Blitzstein interrupted by asking if the actuarial reduction table had been prepared and Houston replied that he would provide it, but had not seen the table and did not know how the calculations were being performed. After completing his oral review of Respondent's revised proposals, Houston went through the union proposal, rejecting each item to which Respondent did not agree.

Houston then announced that this represented Respondent's last and final offer. Boyens protested that Houston could not adopt that position because there were outstanding information requests.[10] Houston replied that Respondent would continue providing information as it became available. Boyens accused Houston of refusing to bargain, thereby committing an unfair labor practice. Houston disputed that characterization and asked if Boyens wanted to bargain about the single-employer issue, but Boyens responded that he did not want to do so, because, ''you've got the wrong people at the table.'' Houston left the meeting.

Houston testified that when he left the September 30 negotiating session, he had not made a decision concerning implementation of Respondent's last and final offer. However, by the following day, he decided to do so and, accordingly, notified the Union of that decision. Furthermore, as the weeks passed, he kept his promise to continue furnishing information to the Union. Thus, by letter dated October 14, Respondent provided responses to two of the items sought by the Union's September 18 letter and covered by Boyens during his September 30 enumeration of deficiencies. The remaining items were provided by letter dated November 12. On the following day, November 13, Respondent sent copies of the by-then completed plan and trust agreement. However, not until December 19 did Houston transmit the table of actuarial rate equivalents that Blitzstein had requested.

Following implementation of Respondent's last and final offer, the parties met on four more occasions during that year, beginning on October 16, and on five additional occasions between January 18 and May 26, 1988. The Union reduced its proposed pension increase; Respondent proposed an increase in monthly benefits for current retirees. However, no other meaningful progress was made toward final agreement on all terms for a collective-bargaining contract. By the time of the hearing, the parties remained essentially where they had been when the strike commenced and when Respondent implemented its last and final offer.

2. Analysis

As discussed in section III,A, supra, the disputed allegations of the complaint assert that Respondent bargained in bad faith in three respects: by failing and refusing to furnish relevant information from June 22 to November 17, when the Union actually received the pension plan revised to incorporate the 1986 contract changes; by declaring an impasse in negotiations without having furnished that information as well as the revised trust agreement and some of the alter ego/single-employer information, and by depriving the Union of sufficient time to examine and to consider alter ego/single-employer information that had been provided; and, by unilaterally changing terms and conditions of employment when it implemented its last and final offer on October 1. I conclude that there is insufficient evidence to support the first of these allegations. However, a preponderance of the evidence does support the allegations that Respondent violated the Act by declaring an impasse and, further, by implementing the changes embodied in its last and final offer, because not all the relevant information had been provided to the Union by the dates of those actions, and, also, the Union had not had sufficient time to meaningfully inspect the information that had been supplied to it on September 30. In short, ''Respondent[] simply acted too quickly in [declaring impasse and] implementing the last offer . . . .'' *Dependable Maintenance Co.*, 274 NLRB 216, 219 (1985).

With respect to the alleged delay in providing information, the complaint identifies the period from June 22 to November 17. So far as the evidence discloses, of all the information requested on June 22, only a pension plan embodying the 1986 changes had not been supplied to the Union until November 17.[11] On its face, a 5-month delay appears exces-

[9] Houston testified that he had heard Boyens made similar statements in previous negotiations with him at Respondent and at Big Horn since 1983, but further negotiations usually yielded only ''maybe very minor movement.'' Further, Houston testified that on September 30, Boyens never did specify the areas in which movement could occur. Indeed, testified Houston, from the beginning of negotiations Boyens had not indicted any willingness to move from the basic Island Creek job-security proposal, to accept Respondent's position on union security, nor to accept Respondent's position on duration of the contract.

[10] Union President Larry Deeds testified that, to the best of his recollection, there had been no mention of outstanding information requests at the conclusion of the September 30 negotiating session. However, Deeds' affidavit recited that Boyens had made such a statement. More important, Houston testified that Boyens had done so: ''Boyens said, 'You can't do that. That's a clear unfair labor practice. You've got to provide us that information.'''

[11] No SPD was provided until the following year. However, there is no allegation of a delay in providing information beyond November 17. Moreover, the only ERISA expert who appeared as a witness testified that, under that legislation, entitlement to SPDs was the right of employees, not of their bargaining agent. Of course, that is not dispositive of entitlement to a copy under

Continued

sive by most standards. Yet, the evidence shows that the delay resulted initially because the Union did not understand ERISA requirements for preparation of a plan, which led to an ambiguous request on June 22, and then by Respondent's legitimate need for time to prepare one.

As set forth in the preceding subsection, on June 27, the Union requested only a ''current ERISA Plan document,'' as well as amendments and modifications required by ERISA. In doing so, the Union was seeking a document which embodied the 1986 changes.[12] But, undisputed expert testimony established that ERISA had not obliged Respondent to prepare a new plan, including the 1986 contract changes, by mid-1987. Consequently, when Respondent furnished the pre-1986 documents, it did, in fact, furnish the ''current ERISA plan.''

Of course, once the Union discovered that it had received a document that was stale in terms of the 1986–1987 contract, it requested a plan that embodied the changes resulting from that contract. It also requested a copy of a similarly current trust agreement. But those requests were not made until September, over 2 months after the initial request had been made. Because the 1986 change from co- to single-trustee affected a substantial portion of the plan, drafting of a revised plan was not a summary process. Nor is there evidence that Respondent did not attempt to have it completed in as short a time as the complexity of the problem would permit.

The duty to furnish requested information is not a rigid and unreasonable one. It requires no more than an honest effort to provide whatever information is requested as promptly as circumstances allow. Here—in light of the initial misunderstanding concerning a ''current ERISA plan,'' the relatively belated point in time when the Union clarified its request, the somewhat late request for a copy of the trust agreement, and the undisputed time-consuming task of preparing a revised plan and trust agreement that would encompass the 1986 change from co- to single-trustee—a preponderance of the evidence does not warrant the conclusion that Respondent delayed unlawfully in furnishing the updated plan and trust agreement to the Union.

However, a contrary conclusion is warranted with respect to Respondent's presentation of a last and final offer on September 30 and, moreover, concerning implementation of the terms of that offer on the following day. In these areas, the governing legal principles are clear and well settled. During negotiations, an employer is not free to make changes in subjects under negotiation until an impasse exists. ''We hold that an employer's unilateral change in conditions of employment under negotiation is . . . a violation of § 8(a)(5) . . . .'' *NLRB v. Katz*, 369 U.S. 736, 743 (1962). ''An employer violates [§ 8(a)(1) and (5) of the Act] if he unilaterally changes a condition of employment that is under negotiation before bargaining has reached an impasse.'' *Richmond Recording Corp. v. NLRB*, 836 F.2d 289, 293 (7th Cir. 1987).

A legally recognized impasse cannot exist where the employer has failed to satisfy its statutory obligation to provide information needed by the bargaining agent to engage in meaningful negotiations. ''A failure to supply information relevant and necessary to bargain constitutes a failure to bargain in good faith in violation of Section 8(a)(5), and no genuine impasse could be reached in these circumstances.'' *Pertec Computer Corp*., 284 NLRB 810 (1987). As in *Pertec*, most cases applying this principle are ones where the employer has unlawfully refused, altogether, to provide the information. As I have concluded above, this is not the situation presented in this case. Respondent argues that absent such evidence—evidence of an unlawful refusal to provide information—a statutory refusal to bargain cannot exist in this type of situation. That is, contends Respondent, a refusal to bargain based on a failure to provide information can exist only where the refusal to provide the information is, itself, unlawful.

Yet, a bargaining agent's position is no different in the one situation than in the other. In both, it is deprived of information that it needs to properly assess the employer's proposals and, concomitantly, to properly formulate bargaining proposals of its own. In fact, even where an employer has complied with its statutory duty and information is provided, the Board has concluded that genuine impasse cannot be declared, and a final offer implemented, ''before the union had a reasonable opportunity to review the relevant information provided to it . . . and to analyze the impact such information would have on any counteroffers it might make.'' *Storer Communications*, 294 NLRB 1056 (1989) (describing the meaning of the Board's earlier holding in *Dependable Maintenance Co*., 274 NLRB 216 (1985), and 276 NLRB 27 (1985)). Of course, there may be situations where there exists a compelling need for a party to declare impasse before all requested relevant information has been provided. However, this is not such a case, inasmuch as Respondent has presented no evidence of any compelling economic need to have made a last and final offer on September 30.

Obviously, the requested information must be relevant to the negotiating process—must relate to a mandatory bargaining subject. See, e.g., *Service Employees Local 535 (North Bay Center)*, 287 NLRB 1223 fn. 1 (1988). Yet, there can be no question about the inclusion of retirement programs as a mandatory subject of bargaining. ''To be sure, the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining.'' *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co*., 404 U.S. 157, 180 (1977). Nor can it be said that pensions are a less important than other mandatory subjects, since ''the Board has not differentiated among the various mandatory subjects of bargaining.'' *Arrow Automotive Industries*, 284 NLRB 487 (1987).

Respondent argues that the Union had not needed a revised plan and trust agreement to make economic proposals pertaining to pensions. Boyens, of course, acknowledged as much during the negotiations. However, noneconomic aspects of pension programs also are important. Although the Union made some noneconomic pension proposals, throughout negotiations it repeatedly reserved its right to make additional ones, if warranted by examination of the plan and trust agreement incorporating the 1986 changes. Consequently, Respondent was on specific notice of the importance to the Union of the noneconomic aspects of the pension program.

In the briefs, arguments are exchanged concerning whether Respondent had a statutory duty to prepare a plan and trust agreement embodying the 1986 changes, with the General

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the Act. But, in view of the state of the pleadings, I conclude that this issue need not be reached.

[12] Indeed, a simple list of amendments and modifications would not have been helpful, since the 1986 changes required entire redrafting of the plan.

Counsel claiming that such a duty existed under *Vore Cinema Corp*., 254 NLRB 1288 (1981), and *Beyerl Chevrolet*, 221 NLRB 710, 720–721 (1975), and with Respondent claiming that, simply because a bargaining agent requests it, no case holds that ''an employer is obligated to prepare, or cause to be prepared, a document not then in existence,'' citing *Gilberton Coal Co*., 291 NLRB 344 (1988), and *United Engines*, 222 NLRB 50, 56 (1976). This, however, is a dispute that need not be addressed further in the context of this case. For, once the misunderstanding was clarified regarding the exact plan and trust agreement sought by the Union, Respondent readily promised to prepare and to supply these documents to the Union. Consequently, the crucial issue is whether, in the face of that promise, Respondent was free to make a last and final offer before they were prepared and provided to the Union.

During negotiations, Houston asserted that the 1986 pension changes had been straightforward ones that did not necessitate actual examination in a revised plan for the Union to negotiate intelligently concerning the noneconomic aspects of pensions. Yet, that assertion effectively was refuted by the testimony of Respondent's own expert, as well as by that of trustee Ziegenbein. As quoted in section III,A, supra, the former explained that the change to single trustee required substantial rewriting of the plan to ensure that all of the ''gotcha's'' among the needed ''multitudinous'' changes were covered. Similarly, Ziegenbein denied specifically that the changes could be characterized as ''minor,'' explaining that, ''They affected the administrative areas of the pension plan and the trust document.'' In fact, once the revised documents were submitted in November, Blitzstein felt that they erroneously deleted the Union's right, independent of the number of trustees, to review and approve all future amendments. This, of course, is the very type of dispute that could have resolved through negotiations, had Respondent but refrained from making a last and final offer until the Union had received and inspected the revised plan and trust agreement—just as had occurred in 1984 when, as described in section III,A, supra, the Union had secured revisions in the draft plan and trust agreement for Big Horn employees.

It also is worth noting that the revised plan and trust agreement were not the sole pension-related documents not yet furnished to the Union when negotiations were discontinued on September 30. Since September 22, Blitzstein had been seeking an actuarial reduction table so that he could evaluate Respondent's own joint and survivor retirement option. That document would not be provided until December. In addition, on September 30, Houston promised that he would provide copies of investment contracts for the PKS profit-sharing plan and for Respondent's pension plan, pursuant to Blitzstein's request during the September 29 negotiating session. Again, while these documents ultimately were furnished to the Union, that did not occur until after October 1.

While the precise word was not uttered on September 30, Respondent concedes that it regarded negotiations at impasse on that date. However, under the principles set forth above, so long as there were unanswered requests for pension-related information, this was not a position that Respondent was free to adopt and act on.

Although, perhaps, cumulative in light of the foregoing conclusion, the Union's request for the so-called alter ego/single employer information should not be ignored. On September 30, Respondent timely furnished information sought by the Union's September 18 letter.[13] Moreover, during the negotiating session that day, in light of the clarification provided by Boyens, Houston promised to provide the remaining information requested in the September 18 letter: minutes of management committee meetings; identities, titles, and duties of overlapping officers, shareholders, directors, and management representatives, as well as of individuals and entities providing services to both Respondent and other mines; descriptions of services provided by other operators to Respondent; and, communications to Respondent governing work that it was to perform. Furthermore, during this negotiating session, more specific discussion of KMG's role in Respondent's operations led Boyens to announce that he intended to request the same information about KMG. Consequently, when Respondent concluded the September 30 session, considerable information in the alter ego/single employer area remained unanswered.

In explaining to Houston his reasons for wanting this information, Boyens advanced essentially two reasons: to ascertain the identity of the true entity with whom the Union should be negotiating and, second, to formulate proposals regarding employment security. It is problematic whether, standing alone, the first reason would justify production under the Act of this information. ''Information concerning the existence of an alter ego . . . operation is not presumptively relevant. Therefore, a union must show it has a reasonable belief that the information is relevant.'' *C.E.K. Industrial Mechanical Contractors*, 295 NLRB 635 (1989). True, a bargaining representative ''is entitled to know the identity of the employer of the employees it represents.'' *Island Creek Coal Co*., 292 NLRB 480 (1989). Yet, the Union already knew the identity of the employer of the employees for whom it was bargaining. Indeed, it had been bargaining with Respondent for 4 years. There is no evidence that, during that time, reason for concern had developed concerning Respondent's ability to discharge its obligations under the Act to the Union. The situation is hardly different than the ones existing between corporations and their shareholders. The relevancy standard in this area is not satisfied merely by vague assertions such as ''more effectively representing employees'' or ''being able to bargain more intelligently.'' See, e.g., *Super Valu Stores*, 279 NLRB 22 (1986).

On the other hand, employment security is a mandatory subject of bargaining. *Brockway Motor Trucks v. NLRB*, 582 F.2d 720, 726 (3d Cir. 1978). For example, ''an employer has a statutory obligation to bargain about an economically motivated decision to lay off employees.'' *Stamping Specialty Co*., 294 NLRB 703 (1989). ''Laying off workers works a dramatic change in their working conditions (to say the least), and if the company lays them off without consulting with the union and without having agreed to procedures for layoff in a collective bargaining agreement it sends a dra-

[13] Only Respondent is charged with having committed unfair labor practices in this proceeding. Consequently, no unfair labor practice issues are posed regarding the identical requests for this information sent to other coal mine operators, such as PKS and NERCO. Their only possible significance here is that those requests do tend to support the Union's assertions that it genuinely was trying to determine if a relationship existed between Respondent and other mine operators and, accordingly, was seeking to gather pertinent information from the operators of other mines, as well as from Respondent.

matic signal of the union's impotence.'' *NLRB v. Advertisers Mfg. Co*., 823 F.2d 1086, 1090 (7th Cir. 1987).

In the instant case, the Union genuinely was concerned about layoffs, as illustrated by comments made during discussions and meetings of employees, as well as by those of Boyens during negotiating sessions. Nor was this concern unfounded. By its very nature, coal mining depletes both the coal and the employment of those who mine it. Further, there seems to be no dispute that the potential for layoffs would be expanded if the Union were to agree to Respondent's initial subcontracting proposal. Indeed, even under then-existing conditions, employees had been notified, earlier in the year, that layoffs would be occurring. Accordingly, it cannot be said that the Union was embarking on some form of lark, unrelated to its role as bargaining agent, when it attempted to bargain about procedures for continuing employment of unit employees who would be laid off.

Of course, if no alter ego or single-employer relationship existed between Respondent and the other entities about which the Union sought information, then there would be no basis on which to seek preferential hiring at mines controlled by the other mine operators—at least, not during bargaining with Respondent. For, a bargaining agent is not free to insist that an employer secure preferential hiring rights for its laid-off unit employees with independent and unrelated employers. However, a bargaining agent can attempt to secure preferential hiring for laid-off unit employees in another department or at another branch facility of the employer who lays them off. So too, it can *seek* their preferential hiring by another employer if the latter constitutes a single employer, or an alter ego, of the employer for whose laid-off employees that union serves as bargaining agent.[14]

Of course, the bargaining agent must show more than a wish and a hope to establish a statutory right to such information. However, following receipt of the September 18 letter, Respondent did not argue that there was an insufficient basis for producing the information sought in it. Nor does it now so argue. Instead, Respondent argues that the Union had possessed sufficient information earlier in time to support making the request for this information before September 18—that the Union's own dilatoriness in not sooner seeking this information was what prevented it from having all of it by September 30. Yet, inherently subjective are judgments concerning the exact point in time at which a party possesses sufficient information to be satisfied that it is not jumping the gun—not too prematurely asserting that a sufficient objective basis exists to warrant production of nonpresumptively relevant information. Certainly, there is no doctrine imposing an obligation on parties, at their peril, to maintain a running tally of information about nonpresumptively relevant subjects, as it accumulates, and obliging them to make their requests for it at the precise moment when, hindsight dictates, a sufficient objective basis existed for requesting it. Indeed, it may well be that a too-premature information request might prejudice a party's ability to obtain that same information later when additional facts are disclosed.

Respondent further argues that absence of any actual belief by the Union that it needed this information is shown most graphically by the Union's own initial, far-reaching job security proposal—that it was seeking preferential hiring rights by the other entities before it ever made the requests regarding Respondent's relationship to them. However, this argument confuses the difference between subjective and objective considerations. A party may truly believe that such a relationship exists, but still may not possess a sufficient basis for satisfying the statutorily-required objective basis for entitlement to information showing whether or not that relationship actually does exist. Accordingly, it does not follow that a bargaining agent possesses a sufficient statutory basis for requesting information simply because it has made proposals in a particular area.[15] Significantly, Respondent, itself, gave some indication of actual existence of, at least, a single-employer relationship with those other entities. For it failed to object, on receiving it, that the Union's initial job security proposal encompassed nonmandatory matters, because it extended to entities with whom Respondent had no statutorily countenanced relationship. Of course, before making its proposal, the Union could not have known that Respondent would not interpose such an objection to it.[16]

Respondent's position is not enhanced by Boyens' statements to the effect that, regardless of what the requested information disclosed, he felt that there was an interrelationship between Respondent and those other entities. At best, those statements show no more than genuineness of his belief in the existence of, at least, single-employer relationships, albeit expressed in colorful and strident fashion. However, there is no evidence Boyens would not have been forced to abandon that belief if he received information that refuted his belief—nor did he impress me as some form of kamikaze who would continue to demand a job security provision on the basis of his belief in facts that had been contradicted by the information that Respondent provided to him.

Nor is Respondent's position enhanced by the fact that similar information had been requested by the Union during negotiations for contracts involving mines not operated by Respondent. Each situation must be addressed on its own merits. Thus, regardless of the propriety of the Union's information requests elsewhere, Respondent did not dispute the relevancy of the requests directed at it. Further, if a bar-

[14] I underscore ''seek'' so that my meaning is not misconstrued. In the context presented here, analysis involves exclusively capacity to agree to transfer employees between employers who constitute a single employer or an alter ego—not obligated to do so. Even if two employers have such a relationship, they need not agree to a bargaining agent's demand to grant preferential hiring rights at one to employees laid off by the other. However, a necessary predicate for conducting negotiations regarding the possibility of such transfers is a determination that an alter ego or single-employer relationship, in fact, exists. Consequently, to be able to make that predicate determination, it is necessary to obtain information on the relationship, if any, between employers.

[15] Even assuming that there had been no basis whatsoever for the inter-entity belief underlying the Union's initial, far-reaching job security proposal—and, thus, that the subject of preferential hiring by those entities of Respondent's laid-off employees was a nonmandatory bargaining subject—nothing in the Act prohibits making proposals concerning nonmandatory subjects. The illegality arises if a party insists to impasse on a nonmandatory subject of bargaining.

[16] Respondent also argues that the Union was attempting to expand the bargaining unit through its job security proposal. But that is not an accurate characterization of the Union's proposals concerning that subject. No doubt the Union wanted to continue representing laid off employees if they were hired by, for example, NERCO or PKS. Yet, at no point did the Union propose that, in that event, it be allowed automatically to continue serving as their representative. Instead, its initial proposal did no more than seek agreement to action that affected the statutory right of those employees to select a bargaining agent after being hired by an entity other than Respondent. Respondent does not contend that those particular proposals violated the Act. Nor do they.

gaining agent is conducting separate negotiations with employers whom it believes to be interrelated, it hardly is surprising that the bargaining agent would address identical requests about that asserted relationship to both of them.

Based on the evidence, it cannot be said that the Union had anything to gain by deliberately delaying its alter ego/single-employer information requests. True, the then-existing contract expired on September 30. But, of itself, that expiration did not confer statutory rights on the parties. They still were obliged to continue bargaining until agreement or a genuine impasse occurred. And, as concluded above, that could not occur here until the Union was afforded the opportunity to bargain about all mandatory subjects—an event that could not take place, in any event, until Respondent supplied the pension-related information not yet furnished when the Union made its alter ego/single-employer request on September 18. In short, on that date, the Union already was prevented from meaningful bargaining about pensions, due to a lack of information, and that position was in no way altered by a request for relevant information in another area. Indeed, the alter ego/single-employer information request was satisfied fully before Respondent ultimately supplied the pension plan and trust agreement.

In these circumstances, the Union had a reasonably objective basis for requesting information describing Respondent's relationship with other mine operators. By declaring impasse, through a last and final offer, before all of that information had been provided and, further, before a reasonable opportunity had been provided for the Union to examine and to evaluate the information that had been provided, Respondent violated Section 8(a)(5) and (1) of the Act.

However, Respondent argues that even had the Union possessed all the requested information on September 30, along with ample time before then to inspect and evaluate it, there still would have been no total agreement on that date, because disagreement on too many bargaining subjects still existed. To support that argument, Respondent points to the fact that the Union made no proposals, and no agreement was reached, even after all the requested information had been provided. Not only does this show that impasse would have occurred on September 30 even if the Union had possessed every shred of requested information with ample time to evaluate it, argues Respondent, but it also establishes that no restoration remedy should be ordered even if the impasse had been declared unlawfully, because the Union enjoyed ample opportunity to negotiate even after having obtained the information that it had been seeking. Neither of these arguments have merit.

It is accurate that there are cases holding that subsequent negotiations can erase the effects of unilateral changes made before or during negotiations. See, e.g., *Storer Communications*, 297 NLRB 296 (1989). However, those holdings have been narrow ones. By no means can they be construed as open invitations to escape liability under the Act simply through expressions of willingness to negotiate every time changes are made unilaterally. Not only would such a holding create an avenue to erase unilateral changes in particular situations; in the long run, it also would serve to effectively erase the entire statutory prohibition of unilateral changes. That is not the situation presented by the cases that apply the limited doctrine of postchange negotiations. Rather, those cases usually have presented a limited number of disputed subjects about which the parties have actually been able to negotiate meaningfully after the changes.

''In the usual case, no substantial bargaining has occurred between the parties after the employer's unilateral change; consequently, the typical make-whole order runs from the date of the unilateral change until the employer and union negotiate a new agreement or reach an impasse.'' *NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982). Accordingly, the focus for application of the limited doctrine of cases such as *Cauthorne* and *Storer Communications*, ibid., is on what *actually* occurred, rather than on what *might have* occurred because of the *possibility* that meaningful negotiations *might have been* conducted after the change(s). In fact, the Union did not have a meaningful opportunity to bargain after Respondent had made the October 1 changes. For from that date forward, subjects that previously had been only proposals had become concrete terms of employment, leaving the Union in the position of trying to negotiate ''give-backs'' from Respondent to even restore the bargaining situation to what it had been before October 1. As a result, after that date, Respondent continued to enjoy the fruits of unlawful action that ''undermined the Union's strength in asserting its position.'' Ibid.

True, there is no evidence that the Union requested Respondent to restore employment levels to their pre-October status, cf. *Storer Communications*, supra, 294 NLRB at 1056. Yet, Respondent presented no evidence that it would have been willing to grant such a request, had it been made. Nor is there a basis for inferring from the evidence that Respondent would have been wiling to do so.

In the final analysis, Respondent's argument seeks a process of speculation, rather than of adjudication—one that requires a seer as opposed to a trier of fact. By its nature, contract negotiating is a winnowing process: one in which proposals are continually modified and positions reconsidered, with tradeoffs being made until total agreement can be concluded. ''Employer denial of access to . . . information may for practical purposes be tantamount to interposition of a trench or hurdle which the bargaining representative cannot leap or surmount, such as to halt the usually interactive movement of the bargaining process.'' *Curtiss-Wright Corp*., 193 NLRB 940, 952 (1971). Even had total agreement not been reached by September 30, that did not bring the process to an end. Instead, the Act mandates that it continue until total agreement or valid impasse was reached. And there is no basis in the record for concluding that that could not have occurred in this case.

In fact, it is as reasonable on the basis of this record to infer that—armed with the information it had requested and, accordingly, with the complete picture in focus—the Union would have begun striking the subsidiary deals that lead to total agreement, as to speculate that this would not have happened. Even without all of the requested information, the Union already had begun doing so, as is shown most illustratively by the concessions it had been making throughout the negotiations, including on September 30. For example, it had moved from proposing a wage increase of 65 cents per hour in the first year, followed by 55- and 40-cent increases in the second and third year, respectively to a September 30 proposal of a $900 bonus for the first year and increases of 40 and 35 cents respectively in the second and third contract

years. The Union also had dropped its cotrustee proposal[17] and had withdrawn its initially proposed more stringent restrictions on Respondent's ability to subcontract. Respondent also was going through the process of modifying its own proposals, as illustrated by its agreement to two of the Union's noneconomic pension proposals and by the proffered change in its subcontracting proposal on September 30. Furthermore, Boyens testified that there had been internal union discussions about agreeing to a shorter contract term than initially proposed by the Union and, also, about substituting a maintenance of membership proposal for the more standard union-security provision. Of course, these changes had not been actually proposed to Respondent. Yet, the Union was not obliged to begin bidding more seriously before it had received all of its cards. Concomitantly, nothing compelled Respondent to submit a final offer before providing the Union with all the information needed to negotiate about all the mandatory subjects of bargaining.

In sum, it cannot be said with any degree of certainty that negotiations would not have continued and would not have progressed to final agreement once the Union had been furnished with the requested information and allowed sufficient time to evaluate it. In the circumstances, a contrary conclusion would be speculative. Respondent has shown no compelling need to have made a last and final offer, and then to implement its terms, before the Union had been afforded those statutory rights. As set forth above, it is an unfair labor practice to declare impasse where requested relevant information has not been supplied and it is a further unfair labor practice to implement employment changes in that situation. This is what Respondent has done in this case. Accordingly, I conclude that it violated Section 8(a)(5) and (1) of the Act.

C. *Nature of the Strike*

1. Evidence

Under the constitution of Respondent's international body, ''Only the International President can call or authorize a strike.''[18] By telegram dated September 29, International President Trumka notified Respondent that he had authorized a strike to commence at 12:01 a.m. on October 1, on expiration of the parties' contract. However, Boyens testified that, in fact, he had been authorized by Trumka to make the final decision on whether or not a strike actually would be called. This testimony tends to find support in that of both Boyens and Houston in connection with negotiation of Respondent's 1986–1987 contract with the Union. For, they agreed that a similar telegram had been sent to Respondent in October 1984, during the 1983–1986 negotiations, but that no strike actually had been called during the approximately 2 years that then elapsed before a contract ultimately was executed.

Nevertheless, a strike did begin at 12:01 a.m. on October 1. Not surprisingly, the General Counsel and the Union contend that it had been motivated by Respondent's discontinuance of bargaining and change in employment terms, in the face of unanswered outstanding information requests. Conversely, Respondent asserts that the lack of information was no more than a convenient pretext for a strike that, as promised by Trumka's telegram, would have occurred on October 1 due to Respondent's unwillingness to acquiesce in the Union's contract proposals.

To properly assess these arguments, it is necessary to step back to the period before the strike commenced. Shovel operator Jeff Sajec testified, without contradiction, that during the course of several conversations, the last of which occurred in late August or early September, Union President Deeds had said that the Union had to obtain job security and that he would strike to get it. Similarly, Overburden Foreman Dewey Simmons testified that several employees had said that they felt that there would be a strike, identifying specifically Paul Zawada and John Lien as persons who had made such remarks prior to September 26.[19] In a like vein, drag line operator Brett Buszkiewic testified that on September 23 or 24, Union Vice President Rice had said that there would be a strike, although Rice also had said that he thought that nothing good would come of it. Equipment operator Robert Beckwith testified that prior to September 26, he had received a telephone call from employee Steve Reynolds. The latter had said that he was Beckwith's strike captain and informed Beckwith of the identity of his gate captain, as well as of his location and time of picket duty.[20]

September 26 was a significant date in the sequence of events in this case. For, on that date the Union conducted a meeting of the unit employees, culminating in a majority vote in favor of authorizing a strike. Deeds and Rice each testified that, in the course of addressing the employees, he had specifically listed Respondent's purported failure to produce requested information concerning pensions, as well as Respondent's relationship to PKS and NERCO, among the list of items dividing the parties in negotiations. Both sides presented employees who testified about whether the unanswered information requests had even been mentioned by one or the other of those two union officials during this meeting. Those called by the General Counsel responded in the affirmative, while those called by Respondent answered in the negative. Yet, while I have no doubt about the honesty of these men, I do not feel that reliance can be placed upon any of their accounts. For, when they testified, each of them

[17] This particular proposal originally had been portrayed by the Union as a ''must'' item. Its abandonment furnishes graphic evidence that, despite adamant words, the Union had been willing to compromise, just as it had done in 1986 when it had agreed to medical coverage representing exactly the type of ''give-back'' that it had been proclaiming that it did not intend to concede.

[18] This particular constitutional provision continues on to recite that, ''When a contract expires, the rule of no contract, no work shall prevail unless otherwise ordered by the International President.'' However, Boyens testified that this policy had been supplanted at the 1983 union convention by authorization of a selective strike fund which permitted work to continue without a contract at selected employers. This testimony was supported by evidence that work had continued for Respondent from 1983 to 1986 when no contract had been in effect. More proximately in time, after the Big Horn contract had expired in July, employees represented by the Union had continued working without a contract until early October, after the strike at Respondent already had begun.

[19] Simmons also testified that he believed that he had heard a similar sentiment expressed during the 1983–1986 negotiations when, of course, no strike ever ultimately occurred.

[20] However, Beckwith did not claim that Reynolds had identified any date as the one on which picketing would commence. Boyens acknowledged that strike preparations had been initiated in mid-August. However, he denied that those preparations meant that the Union had intended to commence striking on expiration of the contract. Rather, he testified that the Union merely intended to be in a position to begin striking should it feel that circumstances warranted doing so—in order not to find itself in a position where it felt that a strike was warranted, but where the employees did not know what to do.

appeared uncertain in recollection as to what had been said during this meeting.[21]

What is not disputed is that a strike vote was taken at the end of this meeting. However, almost all of the witnesses agreed that the decision being made by that vote was not to actually call a strike. Rather, the vote was only conducted on the question of whether to authorize someone else to call a strike, if warranted, and to show support for such a decision, if ultimately made. Not one witness claimed that anything was said about starting a strike on October 1.

During the final week of negotiations prior to October 1, additional strike preparations by employees took place. One employee removed his refrigerator and another his washing machine from the plant, so that they would not later have to cross a picket line to get them. Similarly, employees began removing an extraordinary amount of coal, made available to employees for their personal use, and employees began removing their large personal tool boxes on September 30. Drill and Blast Foreman David Ruff testified that when the shift ended at 3:55 p.m. that day, each member of his powder crew turned in his/her powder keys. According to Ruff, one of them—Jerry Martini—said, ''It's going to be a long one.'' However, Ruff did not deny being told by crew member Gay Luth that she was turning in her keys, ''[i]n case of a strike,'' but that if a strike did not occur, ''we'll pick them up in the morning.'' Ruff did agree that he could reissue powder keys at anytime. In addition to the comments made to Ruff, Overburden Foreman Simmons testified, without contradiction, that on September 29 or 30, Deeds had expressed concern about layoffs if Respondent were permitted to subcontract and had added, ''Well, it looks like we're going to go out'' and, further, ''I think it's goin' to be a long one.''

Although Simmons testified that he could not recall if employees ever had removed their tools from the plant on a prior occasion, Ruff testified that he could ''remember tools going out other times, but the actual date I can't, you know.'' In the latter regard, however, more specific information was provided by Houston. He testified that mechanics had packed their tools in preparation for a strike in 1984. Of course, ultimately no strike ever did occur during the course of the negotiations then in progress.

After Houston left the negotiating session on September 30, Boyens had a brief meeting with the negotiating committee and other employees who had been attending that session as observers. Among other things, testified Boyens, he told them that he regarded Respondent's action as an illegal walkout, because it was an unfair labor practice to do so when it was failing to provide information regarding the pension plan and, now, on KMG as a possible additional alter ego. He testified that he said that he would be meeting with the executive board later that day to discuss exercising his authority to call a strike.

Rice and Blitzstein corroborated Boyens' account that he had said that it had been an unfair labor practice for Respondent to terminate negotiations by making a last and final offer without having first provided relevant information. Thus, the former testified that Boyens had said that Respondent was not bargaining in good faith, because it could not go to ''last and final offer with outstanding information requests on pensions and on the single-employer issue.'' Similarly, Blitzstein testified that Boyens had said that Respondent had ''all these information requests outstanding'' and had tried to reach an illegal impasse; that it could not make and implement a final offer with those outstanding information requests.[22]

Later that afternoon, Boyens met with the Union's executive board. However, before that meeting, Blitzstein had jotted down a list of information items that had been requested, but that had not yet been provided by Respondent, including the current pension plan, trust agreement and SPD; investment contracts; and, the actuarial reduction table for Respondent's own joint and survival pension proposal. He reviewed the items on the list with Boyens and the two men also discussed the major unresolved substantive issues. Boyens, in turn, then prepared his own list of unsupplied information items that had been requested. Then, he called the Union's international office to relate what had occurred that day, after which he met with the executive board.[23]

At that meeting, Boyens reviewed his notes and said that the Union had been hamstrung in bargaining by Respondent's failure to provide the requested information which the Union needed. That failure, reported Boyens, constituted an unfair labor practice and would serve as the reason for a strike, if a decision was made to call one, because no impasse could exist without those documents. Deeds testified that Boyens also said that he felt that Respondent would impose the terms of its last and final offer.

With matters in this posture, the only choice, as those in attendance saw it, was to continue working while filing unfair labor practice charges or, alternatively, to strike and file charges. Apparently because of concern about job loss resulting from subcontracting if employees continued to work under Respondent's last and final offer, all in attendance at the meeting agreed that a strike should be called. As the meeting neared conclusion, Boyens agreed to do so. He issued instructions to put the words ''unfair labor practices'' on picket signs and, also, to list PKS and NERCO on some of the signs. Then, aided by Deeds, he prepared a press release to explain the reason for the strike. In pertinent part, that press release recites:

> The UMWA regrets having to take this action, but PKS and NERCO's unlawful actions today have left no other meaningful alternative. PKS and NERCO have offered nothing to the decker miners in wages, benefits,

[21] This is but illustrated by a review of their accounts in the record. For example, shovel operator Sajec conceded that he recalled only a limited number of issues discussed by Rice and by Executive Board Member Whitey Wells. Shop laborer Jurosak admitted that he did not recall Rice's specific statements about the pension information. Shovel operator Boyd claimed that Rice had not enumerated the issues on which the parties were in agreement as a result of bargaining, although it is clear from the testimony of all witnesses that Rice had done so. Welder Allred had no recollection of the manner in which the strike vote had been conducted. Dragline operator Buszkiewic ultimately conceded that he recalled only matters that he regarded as having been ''stressed'' and dragline operator Bensfield admitted that ''one union meeting kind of blends into another, sometimes, and so I'm not sure exactly who got up and spoke.''

[22] With respect to the reference to ''implementation,'' Blitzstein freely conceded that Houston had made no threat to do so, but he testified that the Union's representatives felt that Respondent would do so—as, indeed, it announced the following day that it intended to do.

[23] Although Boyens made no mention of this meeting in his prehearing affidavit, nor in his testimony during the Montana unemployment compensation hearing, there is no basis for concluding that a meeting between Boyens and the executive board had not occurred during the afternoon of September 30.

> pensions, and most importantly job security. Also, the companies are asking for concessions in subcontracting out of work, health plans, seniority, and in other important areas of the labor agreement.
>
> By their refusing to bargain in good faith, and their numerous unlawful unfair labor practices, the UMWA will file, in the next few days, a number of unfair labor practice charges with the national labor relations board.
>
> The callous disregard of these companies to their workers and to the sheridan area community is unfortunate as well as insidious. By asking for givebacks and concessions, and by failing to even offer any no cost job security proposals while they have realized profits of mammoth proportions from the decker mines amply demonstrates these companies corporate greed.

In fact, picketing occurred even before the decision to strike had been made—but it was not conducted by employees. By 3 p.m. on September 30, a group of women, at least some of whom were wives of unit employees, and children had stationed themselves at the main highway entrance to the mine. Some carried professionally lettered signs appealing for drivers to support the Union. However, there is no evidence that employees participated in their activities. When they testified, the Union's officials denied even having been aware of this activity before or while it was occurring. In any event, work for Respondent continued until 12:01 a.m. on October 1.

During the early days of the strike, signs were carried bearing a variety of legends: ''No Takeaway Contracts''; ''No Contract, No Work''; ''Don't Be A Scab.'' In addition, at each entrance a large four-by-four feet plywood sign was erected, announcing that the strike was in protest of unfair labor practices. However, while it is undisputed that these signs appeared by the end of the first week of the strike, there was considerable dispute concerning whether or not they had been erected during the early part of that week. The General Counsel and the Union presented witnesses who testified that they had been in place on the first day of the strike; Respondent presented witnesses who denied that testimony. Undisputed is the fact that there were no signs specifically protesting Respondent's failure to provide information that the Union had requested in the course of negotiations.

Evidence was presented that after the strike had commenced, numerous conversations, meetings and interviews occurred with only infrequent specific reference by union spokespersons to Respondent's failure to provide information needed to negotiate. Nevertheless, there were occasions when that topic was mentioned specifically. For example, shovel operator Sajec, appearing as Respondent's witness, testified that he had learned about Respondent's failure to do so through reading the Sheridan, Wyoming newspaper, as well as from a radio talk show that occurred 2 or 3 weeks after the strike had begun. Moreover, there were several post-September 30 statements by union officials to the effect that Respondent had declared an illegal impasse and that Respondent had bargained in bad faith.

As set forth in section III,A, supra, Respondent notified all strikers that they would be replaced permanently if they did not report for work by October 12. Then, on June 23, 1988, the Union sent a telegram to Respondent offering on behalf of all striking employees to unconditionally return to work. In the case of 80 of these employees, Respondent rejected the offer to immediately reinstate them solely because permanent replacements occupied their jobs.

2. Analysis

Various terminology has been articulated in expressing the standard that must be utilized to determine whether or not a strike is an unfair labor practice one. Thus, it has been concluded that such a strike exists where unfair labor practices were a ''contributing cause,'' *Larend Leisurelies v. NLRB*, 523 F.2d 814, 820 (6th Cir. 1975); *NLRB v. Pope Maintenance Corp*., 573 F.2d 898, 905 (5th Cir. 1978); *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 704 (7th Cir. 1976); *Massachusetts Coastal Sea Foods*, 293 NLRB 496 (1989); or a ''contributing factor,'' *I. W. Corp*., 239 NLRB 478, 478 (1978); or ''a proximate cause,'' *Newport News Shipbuilding Co. v. NLRB*, 602 F.2d 73, 78 (4th Cir. 1978); or ''one of the operative causes,'' *NLRB v. Wichita Television Corp*., 277 F.2d 579, 584 (10th Cir. 1960), cert. denied 364 U.S. 871 (1960); or, ''one of the reasons,'' *NLRB v. West Coast Casket Co*., 205 F.2d 902, 907 (9th Cir. 1953); or ''one of the causes,'' *NLRB v. Milco, Inc*., 388 F.2d 133, 139 (2d Cir. 1968); or ''had anything to do with causing a strike.'' *NLRB v. Cast Optics Corp*., 458 F.2d 398, 407 (3d Cir. 1972), cert. denied 409 U.S. 856 (1972). But, regardless of the precise formulation of the standard in any particular case, all of them express the same basic point: an unfair labor practice strike exists ''if an unfair labor practice had anything to do with causing the strike.'' *Teamsters Local 662 v. NLRB*, 302 F.2d 908, 911 (D.C. Cir. 1962), cert. denied 371 U.S. 827 (1962).

In making this determination, it is not essential to conclude that the strike would not have occurred but for commission of the unfair labor practices. ''Exclusive adherence to a 'but for' test as the only method of analyzing causation would likely prove as unsatisfactory in the labor field as it has in the torts field.'' *Head Division, AMF v. NLRB*, 593 F.2d 972, 982 fn. 19 (10th Cir. 1979). That is, the methodology for analyzing strike causation is not guided by the analytical standard enunciated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Recently, this very point was made quite specifically in *Northern Wire Corp. v. NLRB*, 887 F.2d 1313 (7th Cir. 1989):

> *Wright Line* does not provide the applicable standard in assessing strike causation. The dispositive question is whether the employees, in deciding to go on strike, were motivated *in part* by the unfair labor practices committed by their employer, not whether, without that motivation, the employees might have struck for some other reason.

Consequently, regardless of whether a strike might have occurred on October 1 even had all of the requested relevant information earlier been provided to the Union, Respondent's declaration of impasse at a time when it had not supplied all of it can support the conclusion that the strike was an unfair labor practice one, *if* the absence of that information ''had anything to do with causing the strike,'' *Teamsters Local 662 v. NLRB*, supra, despite the fact that ''there were also other causes of the strike.'' *NLRB v. Fitzgerald Mills Corp*., 313

F.2d 260, 269 (2d Cir. 1963), cert. denied 375 U.S. 834 (1963).

In order to make this causation determination, the Board and the courts of appeals have paid special attention to statements made during negotiating sessions, *Northern Wire Corp. v. NLRB*, supra, and during strike vote meetings. *North American Coal Corp.*, 289 NLRB 788 (1988); cf. *Burner Systems International*, 273 NLRB 954 fn. 1 (1984). In its brief, Respondent places great emphasis on the events of the employee meeting and strike vote conducted on September 26. However, in determining causation of the strike in this case, the events of that meeting are of little assistance. For, at the time of that meeting, Respondent had not yet declared an impasse by making a last and final offer. Nor, so far as the evidence shows, had there been any indication that employees could anticipate that Respondent would do so 4 days after their meeting. Consequently, at the time of their election, the employees had no basis for even suspecting that Respondent would decide to engage in unfair labor practices.

Furthermore, at that meeting the employees did not vote to actually go on strike. Instead, they voted to support any strike that their executive board made the ultimate decision to call.[24] Indeed, this fact significantly undermines the argument that a strike would have occurred at 12:01 a.m. on October 1 without regard to the status of Respondent's answers to the information requests. As the vote on September 26 demonstrates, the majority of the unit employees were prepared to support a strike were one to be called. Consequently, if it truly did intend on that date to strike on October 1, as Respondent argues should be found, then the Union had nothing to gain by concealing that intention from the employees under the guise of a purported authorization merely to decide in the future whether or not a strike should be called. That is, so far as the evidence establishes, the Union would have received as much support from the employees for either proposition.

None of the other events preceding the executive board meeting on September 30 demonstrate an intention by the Union to begin striking on October 1. The Union had long abandoned its rigid ''no contract, no work'' policy. That fact must have been obvious to Respondent from the fact that its employees had continued working from 1983 to 1986 despite the absence of a contract during that 3-year period. More contemporaneously, at the time of Respondent's last and final offer, employees at Big Horn were continuing to work even though no agreement had been reached there for a new contract.

Nor is the conclusion that a strike was definitely planned for October 1 mandated by Trumka's telegram and by the removal of personal items from Respondent's premises. These were not unprecedented events. A similar telegram had been sent to Respondent by Trumka in connection with the 1983–1986 negotiations. Likewise, employees also had removed personal belongings at one point during the course of those negotiations. But no strike ever occurred then. As Luth pointed out to Ruff when she turned in her powder keys at shift's end on September 30, the keys would be picked up the following day if no strike occurred.

In contending that a strike was inevitable on October 1, Respondent places special emphasis on various statements to that effect by employees and by the Union's own officials, especially by Deeds. Yet, for the most part, these statements appeared to have been no more than individual opinions concerning the course that would have to be pursued to secure the goals that the Union sought in negotiations. Not one of these statements show that, even if a strike did occur ultimately, it was planned for October 1. In fact, none of them show that the Union intended to call a strike before it received, and had the opportunity to examine, the information that it had requested of Respondent. In the final analysis, even if it truly would have taken a strike for the Union to achieve its negotiating goals, there is no evidence that the Union actually would have pursued those goals to that point—would not, as it did concerning health benefits in 1986 and as it did regarding its cotrustee proposal in the current negotiations, have backed away from its stated objectives and avoided a strike by lowering its sights and accepting the best deal that it could attain from Respondent without a strike.[25]

Although it does not make the precise argument, Respondent's actual arguments in this area come very close to asserting that it was privileged to declare impasse simply because it anticipated that a strike was going to be called by the Union when the contract expired. Yet, no case has countenanced, in effect, retaliatory declaration of impasse because of anticipation that employees were going to strike. Whether a strike occurs, parties are obliged to continue negotiating until final agreement or genuine impasse is reached. They are not free to rush to impasse simply so they can beat commencement of a strike by their employees.

Of course, there are situations where employee statements and strike preparations are entitled to great weight in determining strike causation—where they are determinative, or at least entitled to significant weight, in evaluating the true cause of a strike. However, such evidence is but secondary and is entitled to consideration only where there is no reliable direct evidence of the reason that a strike was commenced. That is not the situation in this case. Here, there is direct evidence concerning what was discussed with the negotiating committee after Respondent left the September 30 negotiating session and, later that same day, during the executive board meeting which produced the actual decision to strike. In that respect, whether Boyens alone did or did not make the decision to actually call the strike is not the crucial issue. What is crucial is that, in both meetings, there was no dissent from the proposition that a strike had to be called—

[24] It is worth pointing out that even had the employees voted on September 26 to strike over economic issues, that would not necessarily mean that the strike could not be an unfair labor practice one. It is well settled that an economic strike can be converted to an unfair labor practice one where, after it has begun, the employer commits unfair labor practices that inherently tend to prolong it. Of course, a declaration of impasse where none exists, followed by unilateral changes in employment terms, would tend inherently to prolong, if not obstruct completely, the negotiating process. See, e.g., *Powell Electrical Mfg. Co.*, 287 NLRB 969 (1987). By such conduct, any previously declared economic strike would be converted to an unfair labor practice strike.

[25] Nor is a predetermined intention to strike on October 1 shown by the fact that a group of women and children picketed, with professionally lettered signs, at the main entrance during the afternoon of September 30. The testimony of the Union's officials that they had not authorized that activity, and had not been aware of it while it was in progress, is not facially implausible in a society and era when individuals have not been the least reluctant to speak out and engage in direct action, without regard to authorization or approval by the organizations to which they belong. Beyond that, there is nothing inherently inconsistent between publicizing a dispute through informational picketing and continuing to work while the negotiating process runs its course.

and that it had to be called, in the view of those in attendance, because Respondent was declaring an illegal impasse that opened the door to unilateral implementation of the terms of its last and final offer that, in turn, could lead ultimately to layoffs of unit employees as a result of subcontracting permitted under the terms of that last and final offer.[26]

Respondent argues that the testimony concerning Boyens' remarks to the executive board should be viewed with skepticism. Yet, despite some discrepancies about everything that had been said during that meeting, the testimony was generally consistent on the point that Boyens singled out Respondent's failure to complete submitting all of the requested information as a cause for striking. Moreover, that testimony is supported by other evidence that, itself, provides an inference that Boyens likely would have complained to the executive board about the lack of information. The Union repeatedly had requested production of the unsupplied information during negotiating sessions. It had complained to Houston about its inability to negotiate properly without it. In view of these facts, it cannot be said that lack of all the requested information was a subject that the Union's negotiators took lightly. Furthermore, before the executive board meeting, Blitzstein and, then, Boyens each prepared a list, enumerating the items of unprovided information. Surely, they would not have engaged in such an endeavor, during the relatively short time available to them before the executive board meeting, if they did not regard the missing information as being important.

The most compelling factor, however, is Boyens' own contemporaneous reaction to Houston's announcement that he was making a last and final offer. He immediately protested the lack of all requested information. Having done so, at the very time of Houston's departure from negotiations, it hardly is likely that he would have ignored that very subject when thereafter addressing the executive board. Further, having accused Houston directly of committing an unfair labor practice by making a last and final offer before supplying all the requested information, it is unlikely that Boyens would not have repeated that identical sentiment in his remarks to the executive board. Nor is it likely that the subject was viewed any the less seriously during that meeting than had been the view of it expressed directly to Houston by Boyens, as the negotiating session was concluding earlier that day. In sum, a preponderance of the evidence supports the testimony that Respondent's failure to have provided all requested information was a topic, perhaps the principal one considered, in reaching the ultimate decision to go on strike at 12:01 a.m. on October 1.

Neither the absence of reference to unfair labor practices on most picket signs nor the absence of specific reference to lack of information in post-September 30 statements by union officials refutes this direct evidence that the lack of information was, at least, a cause of the strike. Even if there had been a delay in erecting pickets signs bearing unfair labor practices legends, that would show no more than that the Union had not foreseen that it needed to prepare signs in advance protesting that type of conduct—that it did not anticipate that Respondent would violate the Act. Moreover, picket sign legends and statements to reporters are aimed at generating the broadest possible support for a labor organization's strike activity. They are a form of advertising and, as is true of advertising generally, a cerebral, as opposed to an emotional, appeal is not necessarily the most effective approach in evoking a favorable response and garnering support. More specifically although severe, Respondent's unfair labor practices are not ''glitzy'' when viewed from the perspective of public perception. As the length of the hearing, the briefs and this decision illustrate, an understanding of them is not easily reduced to a picket sign legend nor even to a description in a necessarily abbreviated interview.

In sum, the poststrike events must be accorded the same weight as their prestrike relatives. In proper circumstances, the cause for a strike can be inferred from evidence such as public characterizations of a strike, *Massachusetts Coastal Sea Foods*, supra, 293 NLRB 496; *Head Division, AMF v. NLRB*, supra, 593 F.2d at 981 fn. 18; picket sign legends, *Burner Systems International*, supra; lapse of time in filing unfair labor practice charges or dismissal of most charges that are filed, *Northern Wire Corp. v. NLRB*, supra; inability of union officers to explain the purported unfair labor practices that assertedly generated charges that can be characterized as mundane in nature, Ibid; recognition by the bargaining agent of strategic advantage in portraying a work stoppage as motivated by unfair labor practices, *North American Coal Corp*., supra, 289 NLRB 788 fn. 4; and, expectations that a strike might help to settle outstanding issues. *NLRB v. My Store, Inc*., 345 F.2d 494, 498 (7th Cir. 1965), cert. denied 382 U.S. 927 (1965). But these secondary indicia do not serve to refute direct evidence, where it exists, of a strike's cause(s).

Nevertheless, I have considered both pre- and poststrike events in considering the type of strike that occurred in this case. While some may have been phrased or handled better, viewed from the perspective of Monday morning quarterbacking, they do not—individually or collectively—nullify or refute the unfair labor practice character of the strike shown by the credible direct evidence of the events leading to its commencement. Nor do any of them serve to remove the inherently prolonging effect on the strike of Respondent's unlawful implementation of the terms of its last and final offer. Therefore, I conclude that a preponderance of the evidence establishes that the strike was an unfair labor practice one from its inception at 12:01 a.m. on October 1 and that it retained that character at all times thereafter.

It is settled that unfair labor practice strikers cannot be permanently replaced, but instead must be offered immediate and full reinstatement on submission of an unconditional application to return to work. *NLRB v. Fleetwood Trailer Co*., 389 U.S. 375, 379 fn. 5 (1967). A corollary to this principle is that Section 8(a)(1) of the Act is violated whenever strikers in that category are warned that they will be replaced permanently if they do not return to work. See, e.g., *Bozutto's, Inc*., 277 NLRB 977 fn. 3 (1985). Respondent did the latter in October and failed to do the former in June 1988. By this conduct, Respondent violated Section 8(a)(1) and Section 8(a)(3) and (1), respectively, of the Act.

[26] Accordingly, there is no force to the argument that this could not be an unfair labor practice strike, because the strike decision was motivated simply by fear of layoffs. It is undisputed that the Union intended to file unfair labor practice charges, regardless of whether or not there was a decision to strike. Moreover, that fear of ultimate layoffs was generated by suspicion that Respondent would implement the terms of its last and final offer—a suspicion that proved well-founded in light of subsequent events.

CONCLUSIONS OF LAW

Decker Coal Company committed unfair labor practices affecting commerce by its refusal to process grievances after expiration of its collective-bargaining contract and by declaring impasse in negotiations and unilaterally implementing the terms of its last and final offer at a time when there were unanswered and only recently answered requests for relevant information, in violation of Section 8(a)(5) and (1) of the Act; by refusing to immediately reinstate strikers, whose strike was caused at least in part by unfair labor practices, in response to an unconditional offer to return to work, in violation of Section 8(a)(3) and (1) of the Act; and, by threatening to replace permanently strikers whose strike was caused at least in part by unfair labor practices, in violation of Section 8(a)(1) of the Act. However, it did not violate the Act in connection with its efforts to supply information requested by its employees' bargaining agent. Moreover, while I grant the motion to amend complaint with respect to the warning that unfair labor practice strikers would be permanently replaced if they did not report for work, I deny that motion in all other respects.

REMEDY

Having found that Decker Coal Company engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act.

With respect to the latter, Decker Coal Company shall be directed to bargain in good faith with United Mine Workers of America until total agreement or a valid impasse is reached. Moreover, it will be ordered to restore terms and conditions of employment to levels prevailing in the 1986–1987 collective-bargaining contract and to make whole employees for any lost wages or benefits incurred as a result of the unilateral changes made in those terms and conditions of employment on October 1, 1987, as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with, to the extent appropriate, interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, it shall be ordered to maintain those terms and conditions of employment in effect until the parties have bargained to agreement or to impasse.

In addition, Decker Coal Company shall be ordered to offer the 80 employees named in the Order immediate and full reinstatement to the positions to which they would have been reinstated had they not been deprived of reinstatement in June 1988, dismissing, if necessary, anyone who may be occupying the positions to which they should have been reinstated. If any of those positions no longer exist, it shall be ordered to reinstate the appropriate employees to substantially equivalent positions without prejudice to their seniority or other rights and privileges. It shall also be ordered to make all of those employees whole for any loss of pay they may have suffered because they were not immediately reinstated when they offered to return to work. Backpay shall be computed on a quarterly basis, making deduction for interim earnings, *F. W. Woolworth Co*., 90 NLRB 289 (1950), and interest shall be paid on the amounts owing as computed in *New Horizons for the Retarded*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

The Respondent, Decker Coal Company, Big Horn County, Montana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing and failing to bargain in good faith with United Mine Workers of America—as the exclusive representative of employees in the appropriate unit of employees at all pits of Decker Coal Company now or hereafter added, who are engaged in production and maintenance at the Decker, Montana coal mine, excluding guards, watchmen, office clerical employees, engineering employees foremen, and supervisors as defined in the Act—by premature impasse declarations, by implementing last and final contract offers without having reached a valid impasse, and by refusing to process grievances because of the expiration of a collective-bargaining contract.

(b) Failing and refusing to reinstate unfair labor practice strikers after receiving their unconditional offers to return to work, including:

Jim Aksamit	Larry Kobielusz
Tom Allen	Darryl Kurtz
Bob Allred	Mary Lance
Duane Anderson	Gay Laya
Ron Anderson	Bobby Legerski
Ken Ballek	Madonna Lyons
George Batt	Raynard McKenzie
Larry Baumgartner	Bud Madron
Marshal Bears	Bob Marchant
Art Benton	Dan Mest
Bill Biesterfeld	Brent Moore
Bruce Bisbee	Bill Morgareidge
Dave Blankenship	Bruce Morrill
Bob Bond	Clayton Morris
Leonard Bull	Ken Mortensen
Dwight Castle	Vic Mortensen
Buddy Chaffee	Jack Murray
Bill Clark	Jerry Noecker
Lawrence Conner	Jerry O'Daniels
Pete Crook	Jim Palser
Roger Duin	Ernie Roberts
George Eisele	Brad Robinson
John Eychanor	Ron Rosenlund
Dalton Gaynor	Jim Schutte
John Gazdik	Merle Smith
Richard Glantz	Tom Smith
Ken Greer	Dennis Songer
Rick Hanslip	Gene Songer
Madge Herden	Derald Stiles
Dick Herman	Ray Swanby
Al Herrera	George Taylor
Gary Hinz	Gerry Thompson
Rod Howell	Larry Tibbets
Dale Jacobson	Steve Torbet

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Dan Johnson	Rodger Wagner
Greg Johnston	Leroy Westika
Marc Ketcham	Dick Williams
Jim Kibler	Karen Woodard
Gary King	Jerry Woodward
Alan Kobielusz	Don Ziegler

(c) Telling unfair labor practice strikers that they will be permanently replaced if they do not report for work by a certain time.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain collectively in good faith with United Mine Workers of America, as the exclusive representative of the employees in the bargaining unit set forth in subsection 1(a) above, and embody any understanding reached in a signed agreement.

(b) Restore employment terms to the levels set forth in the 1986–1987 collective-bargaining contract with United Mine Workers of America and maintain them until such time as the parties have bargained in good faith and reached agreement, or alternatively, until a valid impasse is reached.

(c) Make whole all employees, for any losses they may have sustained by reason of the implementation of unilateral changes in employment terms on October 1, 1987, in the manner set forth in the remedy section of this decision.

(d) Offer immediate and full reinstatement to the 80 employees named in subsection 1(b) above to the positions to which they would have been reinstated had their offers to return to work not been refused, dismissing, if necessary, anyone who may be occupying those positions or, if any of those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered as a result of the discrimination they suffered, in the manner set forth in the remedy section of this decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Big Horn County, Montana mines copies of the attached notice marked ''Appendix.''[28] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not found.

[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''